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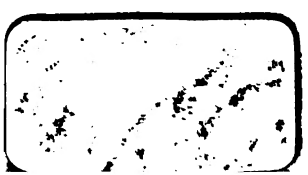

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REPORTS

OF

CASES

ARGUED AND ADJUDGED

IN THE

COURT OF KING'S BENCH.

REPORTS

CASES,

ARGUED AND ADJUDGED

IN THE

COURT OF KING'S BENCH,

IN THE ELEVENTH AND TWELFTH YEARS OF THE REIGN OF KING GEORGE THE SECOND.

By GEORGE ANDREWS, Esq.
OF THE MIDDLE TEMPLE.

THE SECOND EDITION.

With Notes and References down to Michaelmas Term, 31. Geo. 3. and an Appendix containing ſome additional Caſes not before Publiſhed.

By GEORGE WILLIAM VERNON, Esq.
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PREFACE

TO THE

SECOND EDITION.

NEAR forty years ſince the publication of the former Edition having elapſed* when the intention of publiſhing this ſecond Edition was conceived; it naturally occurred to the Bookſeller who now ſubmits it to the public, that the numerous publications of reports and other books upon legal ſubjects in that interval might contain conſiderable matter bearing ſome connection with the caſes here reported. To have the work, therefore, improved by references to ſuch matter, he conſidered as a duty incumbent upon him and ſuitable to that attention which

* The firſt Edition is dated A. D. 1754.

which it is his wiſh to manifeſt towards the public and eſpecially towards the Profeſſion of the Law.—The execution of this taſk he was pleaſed to confide to me, and it is now ſubmitted to the candid judgment of a learned profeſſion, whoſe approbation, even in a work of this kind, which can reflect but little credit on the performer, I confeſs myſelf anxious to obtain. The merit of ſuch a work can only be diligent reſearch—*that*, I hope, will be found to have been uſed in preparing this edition. Whatever may be its reception, I feel this ſatisfaction at my having undertaken it, that it has led me to an attentive peruſal of theſe caſes, which I cannot but conſider as deſerving, in general, the character of accurate, judicious, and ſatisfactory reports: many of the caſes are alſo reported in *Strange*'s reports, in caſes *Temp.* Ld. *Hardwicke* and elſewhere; but the ſuperiority of Mr. *Andrew*'s Report, in almoſt every inſtance, is extremely conſpicuous; and I think it much to be lamented that his Reports are confined to ſo ſmall a ſpace of time. To no other circumſtance but this and the great *ſcarcity* of copies of the

firſt

firſt Edition can I aſcribe it, that they appear to be ſo *ſeldom* reſorted to. I have often found a ſhort imperfect memorandum of a caſe by Sir *John Strange*, referred to, tho' a full and ſatisfactory report of the ſame caſe be extent in theſe Reports.—In this Edition marginal ſummaries of the principal matter in each caſe are added, and every ſuitable reference that my previous profeſſional ſtudy, or my reſearch on the preſent occaſion, ſupplied, is annexed. In the former edition ſome caſes were inſerted as bottom notes: theſe in the preſent edition are diſtinguiſhed from other notes and additions, by the letter (A) ſubjoined to each original note as it ſtood in the former. The references I have made uſe of are ſuch as are commonly uſed, and I hope will require no explanation.—It ſeems proper however to mention that I refer to the Quarto Edition of *Barnes*'s notes, or the Iriſh 8,vo. Edit. the firſt Edition of *Douglaſs*'s Reports and to the *London* Edition, A. D. 1770 of the caſes in the time of Ld. *Hardwicke*. Theſe laſt-mentioned caſes are ſometimes erroneouſly referred to as being Lord *Annaly*'s. I have had ſome curioſity

ſity in inquiring into the manner in which theſe caſes (*T. Ld. Hardwicke*) have been introduced to the public. By whom they were taken or compiled, I have not been able to diſcover. I can trace them no farther back than to the hands of the late *Wm. Harward*, Eſq. Barriſter at Law, to whom they were given by ſome perſon whoſe name I have not learned. About the year 1768, Mr. *Harward* gave them to Mrs. *Elizabeth Lynch* bookſeller in *Dublin*, and Lord *Annaly* (to whom Mr. *Harward* had given a copy of the caſes) gave her an index which he had formed for his own uſe. From theſe materials (not prepared for the preſs) was publiſhed the *Dublin* edition which bears date A. D. 1769. Before this edition made its appearance Mrs. *Lynch* ſent the copy to *London* and ſold it to a bookſeller there, who had it reviſed and prepared for the preſs, with the addition of many references.* As thoſe caſes are erroneouſly aſcribed ſome times to Mr. *Harward* and ſometimes

* In this ſtage of their progreſs the reports mentioned, acquired amongſt other additions that very abſurd poſition contained in a note to the caſe of *Lumley* v. *Palmer*, page 75, viz. "That underwriting or indorſing a bill thus, "I will not accept this bill," is held by the cuſtom of merchants a good acceptance" This note is not in the *Dublin* Edition, conſequently it was not in the original manuſcript,

times to Lord *Annaly*, and in the title of the *London* edition are ſaid to have been publiſhed under the inſpection of a noble Lord and an eminent Lawyer; (meaning, I preſume, Ld. *Annaly* and Mr. *Harward*, who were no otherwiſe concerned in the publication than as I have mentioned). I thought it not improper to mention theſe particulars relating to thoſe reports.—In this Edition I have added, in an Appendix, two caſes decided in C. B. *Weſtminſter*, in the time of Geo. 2. of which I happened to have manuſcript reports. As no report of either of them has (as I believe) hitherto appeared in print, I have preſumed to inſert them, and to hope that they will be acceptable.

G. W. VERNON.

Dublin, May 23d, 1791.

INDEX

INDEX

OF

CASES REPORTED.

A.

Page.

ANONYMOUS Caſes, 24, 134, 183, 199, 229, 299, 318, 366, 367, 382.
Adams, v. Broughton 18
Adlam, Toe v. 160
Alleyn v. Beer 247
Anderſon v Winter 176
Andrews of the demiſe of Jones v. Fulham - 263
Archer of the demiſe of Hankey v. Snap - - - 341
Armſtronge, the King v. 109
Aſhford v. Hand. 370

B.

Bartholomew v. Ireland 108
Baſs v. Hackford and his wife 375
Bean, Elton v. 12
Bedell, Inhabit. of the King, v. 8
Beer, Alleyn v. 247
Bell and his wife the King v, 64
Bell, the King v. - - 200
Berrington, of the demiſe of Dormer v. Parkhurſt 125, 137
Berry v. Croſs - 62
Betheun, the King v. 281
Betteſworth, the King v. 365
Biſhop, the King v. 220
Booth v. Garnett - 28
Boſworth v. Hearne 91
Blayney, King v. - 240
Blackerby, Langley v. 306
Blunt, the King v. 293
Brown, Vaughan v. 328
——— Thomſon v. 16
Bowes, v. Lucas 55
Brookes Jones v. 266
Brookes v. Crouſe 277
Bance, King v. - 162
Burgeſs, Holliday v. 381
——— Hughes v. 19

Page.

Briggs, Rogers *v.* 210
Broughton, Adams *v.* - 18
Bryan, King *v.* 81, 289
Burket, the King *v.* 230
Burton *v.* Garland 27, 174, 291
Burton *v.* Wileday and others 32
Burton, the King *v.* - 174
Butley (inhabit.) the King *v.* 3

C.

Canterbury (Archbiſhop) Martin *v.* 258
Cann, the King *v.* - 14
Caper, the King *v.* - 220
Carpenter, *v.* Davis 305
Cart *v.* Marſh - 69
Cartwright, Deakin *v.* 308
Caſtle, the King *v.* 119, 241
Chambers's Caſe - 353
Chalie, Haſwell, *qui tam v.* 392
Chapman *v.* Matliſon 191
Chauncey *v.* Needham 53
Churcham, Clifton, *v.* (inhabit) 314
Clifton *v.* inhabit. of Churcham 314
Cockerell, the King *v.* 260
Cockran, French *v.* - 25
Cole *v.* Hawkins 275
Colley, Hickman *v.* 377
Collweſt Holcroft *v.* 65
Cook *v.* Cook - 217
Crofts on the demiſe of Dalby *v.* Wells - - 271
Crofts, Middleton *v.* - 57
Crofts, Berry *v.* - 62
Crow *v.* Maddock - 287
Crowle, Palmer *v.* - 382
Crouſe, Brookes *v.* - 277

D.

Dangerfield, Lockey and wife *v.* 286
Davenport on the demiſe of Kirkby *v.* Jackſon - 368
Davis, Carpenter *v.* 305
Dawſon, &c. *v.* Wilkinſon, &c. 11
Deakin, Cartwright *v.* 308
Dickinſon, & al' Tedloe *v.* 80

Page.

Doe, Roche *v.* - 153
Done, King *v.* 301, 352
Driver *v.* Driver - 304
Duberry *v.* Godfrey 75

E.

Eames, Wilks *v.* - 51
Eddington *v.* Wilcox 208
Elton, Bean *v.* 12
Ely, of Biſhop, King *v.* 176

F.

Farrell's Caſe - 298
Ferguſon *v.* Rawlinſon 113
Finchingfield, Henningham (inhabit.) *v.* - 72, 208
French *v.* Cockran - 25
——— *v.* Whitfield 13
——— Wiltſhire 67, 99
Freſhford, (church-wardens) the King *v.* 24
Fulham, Andrews, on the demiſe of Jones *v.* - 263
Fyfield, Magdalen (inhabit. of) *v.* Weſtower. - 62

G.

Gardiner, the King *v.* 255
Garland, Burton *v.* 27, 174, 291
Garnett, Booth *v.* 28
Gatliff *v.* Hammond 77, 252
Godfrey, Duberry *v.* 75
Goodright *v.* Hodgſon 282
Goodtitle, Mellington *v.* 106
Gooſetree *v.* Reynolds 23
Great Milton, Watthemdale *v.* 57

H.

Haddock, the King *v.* 137
Hamilton, Style *v.* - 53
Hammond, Gatliff *v.* 77, 252
Hamſworth (Rector), King *v.* 184
Hand, Aſhford *v.* 370

Page.

Hareby, (inhabit.) the King v. 361
Harman, & al' the King v. 343
Harwood, the King v. 152
Haſwell, *qui tam* &c. v. Chalie 392
Hawkins, Cole v. 275
Hearne, Boſworth v. 91
———, and his wife, Scudamore v. 340
Hebden, the King v. 388
Heber, Stroler v. 381
Henningham (inhabit. of) v. Finchingfield 208
Hickford, Baſs v. 375
Hickman, Colley v. 377
Hinde v. Thomſon 299
Hodgſon, Goodright v. 282
Holcroft v. Collweſt 65
Holditch, Hornby v. 40
Holliday v. Burgeſs 381
Hollow, Kingſton v. 374
Holmes, the King v. 216
Hook, Ship v. 74
Hooker, Shepherd v. 156
Hoppen v. Leppet 76
Hornby v. Houlditch 40
Hudſon v. Smith 22
Hughes, Burgeſs v. 19
Hutchins v. Hutchins 297

J.

Jackſon (Davenport) v. (on demiſe of Kirby) 368
Jennedy, Marſh v. 356
Indingo v. Solborough (inhabit.) 63
Ireland, Bartholomew, v. (inhabit.) 108

K.

Kay or Wray, (inhabit.) the King v. 67
Keate and Ors v. Watſon 296
Kempfield v. Moore 44

Page.

Kerfoot and wife, Smalley v. 242
Kefworth v. Thomas 208
Kings Lynn (Corp) the King v. 105
King, the, v Armſtrong 109
——— v. Bedell (inhabit.) 8
King the v Bell and his wife 64
——— v. Bell 200
——— v. Bethuen 281
——— v Betteſworth 365
——— v. Biſhop 220
——— v Blaney 240
——— v Bryan 81, 282
——— v Blunt 293
——— v. Bunce 162
——— v. Burket 230
——— v. Burton 174
——— v. Butley, (inhabit.) 3
——— v. Cann 14
——— v Caper 220
——— v. Caſtle 119, 241
——— v. Cockerell 260
——— v. Dore 301, 352
——— v. Ely, biſhop of 176
——— v. Freſhford, churchwardens 24
——— v. Gardiner 255
——— v. Haddock 137
——— v. Hamſworth, Rector 184
——— v. Hareby (inhabit.) 361
——— v Harman 343
——— v. Harwood 152
——— v. Hebden 388
——— v. Holmes 216
——— v. Kay (inhabit.) 67
——— v. Kings Lynn, corp. 105
——— v. Leaſe 226
——— v. Liſle 163
——— v. Markley (inhabit.) 151
——— v. Marton, inhabit. 276
——— v. Maſſory 295
——— v. Mayors 209
——— v. Middleſex (juſtices) 72
——— v. Middleſex, inhabit. 101, 285
——— v. Norton, inhabit. 307

	Page.
King v. Pawlets -	274
—— v. Piercy -	18
—— v. Pierſon -	310
—— v. Reading	10
—— v. Saliſbury, biſhop of	20
—— v. Sharpe -	384
—— v. Soane	272
—— v. Soleguard	231
—— v. Sowton, inhabit.	345
—— v. Staples -	228
—— v. Towning -	302
—— v. Whyſkin -	1
—— v. Widworthy, inhabit.	4
—— v. Willis -	279
—— v. Wykes -	238
Kingſton v. Holloway	374
Kynaſton v. Shrewſbury, corp.	85, 104

L.

Langley v. Blackerby	306
Leaſe, the King v.	226
Leppet, Hoppen v.	76
Liſle, the King v.	163
Lifter, Ray v.	351, 384
Lockey, and wife, Dangerfield v	286
Lucas, Bowes v.	555

M.

Maddock, Crowe v.	287
Marſh, Cart v.	69
Marſh v. Jennedy -	356
Markley, inhabit. the King v.	151
Marton, inhabit. Same v.	276
Martin v. Canterbury, Archbiſhop of	258
Martin v Sparrow	273
Maſſery, the King v.	295
Matliſon, Chapman v.	191
Mayors, the King v.	209
Mellington, Goodtitle v.	106
Merrick v. Oſſelſtone, [hundred]	115
Middleſex, Juſt. the King v.	72
——, Inhabit. Same v.	101
Middleton v. Crofts	57
Moore, Kempfield v.	44
Moor v Wycker	47, 191
Morris, Weſt v.	31, 201

N.

Needham, Chancery v.	53
Nicholls, Robinſon v.	15
Nicholſons Wellis v.	276
Norton, inhabit the King v.	307
Norwood v. Steveaſon	227

O.

Oatfield, Rice v.	222, 235
Ordn of Demiſe on Lynch v. Stubbs	247
Offelſtone, (hundred) Merrick v.	115

P.

Palmer, Crowle v.	382
Parkhurſt, Smith v.	315
Parkhurſt, Berrington v.	125
Paxton, Pierce v.	332
Pawlett, King v.	274
Phillips v. Phillips -	248
Piercy, King v.	18
Pierce v. Paxton- -	332
Pierſon King v.	310
Poole, Redway v.	362
Potter, Wareing v.	17

R.

Rawlinſon, Ferguſon v.	113
Ray v. Lifter -	351, 384
Reynolds, Gooſetree v.	23
Reynolds, Smith v.	21
Reading, the King v.	10

Page.

Redway v. Poole - 362
Rice v. Oatfield 222, 235
Roach, Doe v. 153
Robinſon, Nicholls v. 15
Rogers, on demiſe of Dawſon v. Briggs 210

S.

Sabbarton v. Sabbarton 333
Saliſbury, biſhop, the King v. 20
Sharpe, the King v. 384
Scudamore v. Hearne and his wife. 40
Shepherd, Hooker v. 156
Ship, Hook v. 74
Shrewſbury, Corp. Kynaſton v. 85, 104
Smalley v. Kerfoot and wife 242
Smith on demiſe of Dormer v. Parkhurſt - - 315
Smith v. Reynolds - 21
———, Hudſon v. 22
———, v. Wilſon 187, 228
Snap, Archer, v. on the demiſe of Hankey - 341
Solborough, inhabit. Indingo v. 63
Sparrow, Martin v. 273
Soane, the King v. 272
Soleguarde, Same v. 231
Sowton, inhabit Same v. 345
Stevenſon, Norwood v. 227
Stroler v. Heber - 381
Style, Hamilton v. 53
Surby and wife v. York 7
Staples, the King v. 228
Stubbs, Ordn on demiſe of Lynch v. 247

T.

Tedloe v. Dickinſon & al' 80
Thomas, Keſworth v. 208
Thompſon v. Browne 16
Thompſon, Hinde v. 299
Thruſtout on demiſe of Park v. Troubleſome - - 297
Toe v. Adlam - 160
Towning, King v. 302
Troubleſome, Thruſtout v. 297
Turner v. Warren - 70
Turner, Webb v. 250

V.

Vaughan v. Browne 328

W.

Utoxeter, inhabit. Woolſtanton v. 362, 371
Walthamdale v. Great Mitton, inhabit. - 57
Wareing v. Potter - 17
Warren, Turner v. 70
Watſon, Keate and Ors v. 296
Webb v. Turner - - 250
Wellis v. Nicholſon 276
Wilks v. Eames - - 51
Wells, Crofts v. 271
Weſt v. Morris 31, 201
Winter, Anderſon v. 176
Woolſtanton v. Utoxeter, inhabit. 362, 371
Wileday, and Ors v. Burton 32
Wilcox, Eddington v. 208
Whitfield, French v. 13
Wiltſhire v. French 67, 99
Whyſkin, King v. 1
Widworthy, inhabit. King v. 4
Willis, King v. 279
Wykes, King v. 238
Wycker, Moore v. 47, 191
Wilſon, Smith v. 187, 228
Wilkinſon, &c. Dawſon, &c. v. 11
Weſtower Fryfield, v. Magdalen, inhabit. of - 63

Y.

York, Surby and wife v. 7

INDEX

OF

CASES CITED.

A.

Page.

ANONYMOUS v. Grano 12
Anonymous v. Marſton, pariſh of 347
——— v. Peacock 161
——— v. Wyndham 219
Aores v. Lord Peterborough 88
Aſton v. Somner - 193, 198
Alcock v. Griffith - 199
Alvarez v. Hughes - 78
Anderſon v. Williamſon - 29
Andover, corp. v. King 184
Andrews, Aſtell, *qui tam*, &c. v. 393
———, Cattell v. 157
Archer, Swetnam v. 59
Argyle . Hunt - 305
Armagh dean v. King 20
Arſcott Cherbury, v. inhabit. 365, 373
Aſtell, *qui tam*, &c. v. Andrews 393
Atkinſon, Lupton v. 176
Axen, Jones v. 290
Anyhoe, inhabit. King v. 63

B.

Page.

Babington, Holbourne v. 89
Badmarring, Pyke v. 236
Bagſhaw, Wainright v. 11
Bagſhaw on demiſe of Wynne v. biſhop of Bangor - 319
Baker v. Cambell 78
——— on the demiſe of Brown v. Petcher - - 319
Bancroft, Loffill v. - 391
Bailey v. Burne - - 183
Baldwin, Langley v. 339
Bank of England v. Morris 110
Barber v. Palmer - 329
Barker v. Dixy - 261
Barnard, Worceſter v. 69
Bangor biſhop, Bagſhaw v. 319
Beckwith v. Ibbotſon 214
Beckworth, King v. 123
Bellew v. Scott - 246
Bennett, King v. 168
Bentley's, Doctor, Caſe 58
Berry v. Croſs - 62

Page.

Berry v. Perry - - 375
Betteſworth, doctor, v. dean &c. of St. Paul's 42
Bewdy, corp. King v. 52, 317
Blackbourne, Crew v. 247
Blackwater Everſly, v. pariſh of 350
Blackwall, Foſter v. 386
Blake v. Bourk - 225
Blew v. Marſhall 338
Bolton, King v. 12
Bond's, Sir Harry, caſe 146
Bowden, Totneſs v. 169
Bowes, King v. 139, 147
Bourk, Blake v. 225
Bourne v. Mattaire - 244
———, Hunt v. 327
Bradley v. Millar - 309
Braſsfield v. Lee - 246
Brightwell, inhabit. of v. Weſthanning 63
Briſkall, Grey v. 331
Brinſlow, Mellam v. 236
Brookes v. Jones - 266
Brook v. Minsfield - 7
Browne, Williams v. 134
———, v. Taylor 338
Burlace, Doe v. 108
Buells, the King v. 247
Bull, Shaw v. 212, 215
Burne, Bailey v. 183
Burridge, the King v. 52

C.

Caine, Portman v. 357
Cambell, Baker v. 78
Cattell v. Andrews 157
Cave, Done v. - 284
Chalten, Pauſley v. 373
Charleſworth, King v. 14
Charleton, Widdrington v. 68, 142
Cherbury, inhabit. of v. Arſcott 365, 373
Cheſter, biſhop, King v. 181, 184
Chivers, Moreſoot v. 244
Clarehall, King v. 184
Clargis v. Sir William Shrewin 390
Clever v. Jordan 15
Cloſe v. Roſs 224, 237
Cocklow, Ward v. 66
Cook v. Wingfield 300
Corne, Ruſſell v. 245
Cowell v. Walter - 297
Crew v. Blackbourne 247
———, Harding v. 318
Crofts v. Wells - 368
Croſs v. Speed - 352
———, Berry v. - 62
Cureden, inhabit. of v. Leland 364

D.

Damage v. Watkins - 16
Daniel, Lee v. 112
Daveniſh v. Merton - 377
Davis, King v. - 173
———, Magworth v. 340
De' Fevre, Evans v. 16
Delandre, Pauler v. 357, 359
Dixy, Barker v. 261
Dobbs v. Paſſer - 319
Dodd v. Fletcher 193, 195, 197
Doe v. Burlace - 107
Done v. Richardſon 193, 197
———, Cave v. - 284
Dormer v. Parkhurſt 298
Douglas v. Hall 21
Doulting, inhabit Stokelane v. 314
Dublin, Dean, King v. 20
Dutcheſs of Marlborough v. Whitmore - - 112

E.

Eaſt Goodaway, inhabit. v. Weſt Goodaway - 350
Eaſt Goodaway v. Munclere 346

Edge,

	Page.
Edge, Scatterwood v.	269
Edgeware, parish of v. Harrow	349
Edwards, the King v.	111
Elford, the King v.	28
Ellam, the King v.	13, 110
Elliot v. Man	66
Elms, the King v.	229
Ely, bishop, King v.	184, 187
Evans v. Thomas	12
—— v. de' Fevre	16
Eversley, parish of v. Blackwater	350
Eyles's, Sir John, Case	51

F.

Falconbridge's, Lady, case	19
Fanwick, (inhabit. of) v. Marson	307
Farewell, Neminick v.	320
Farthing v. Martyr	28, 292
Fleetwood, Thornby v.	104
Fletcher, Dodd v.	193, 195, 197
Floyd, the King v.	82
Foster v. Blackwall	386
Franklyn v. Reeves	284
Fuller v. Jocelyn	54, 309
——, Smith v.	386

G.

Garrett, Mitchell v.	228
Gawl, the King v.	25
George, Norman v.	283
Gibbs, King v.	175
Gill, Parsons v.	310
Gloucester, Mayor, King v.	184
Goodman v. Shipway	188
Goodtitle on demise of Lord Gower v. Thrustout	133
Grano, Anonymous v.	12
Greaves, King v.	309
Gregory, Wheate v.	51
Grefwick v. Warren	265, 271
Grey v. Briskall	331
Griffith v. Alcock	199
——— v. Pope	189
Guilford, inhabit. the King v.	4
Gyles's Case	180

H.

Hall, Douglas v.	21
Hammond, Jones v.	369
———, the King v.	143, 145
Harris v. Renny	25
Harding v. Crew	318
———, the King v.	16
Harrow, Edgware, parish of v.	349
Harwick, Bur. the King v.	279
Heaver, parish of v. Sunbridge	346
Hebright v. Ibbotson	155
Hedges Rigden v.,	197
Heyward, Page v.	269
Hellidge v. Hungerford	371
Henley, the King v.	355
Heptinstal, inhabit. the King v	372
High Ferrar's, Corp. the King v.	280
Hobson, Messenger v.	27, 28, 292
Holbourne v. Babington	89
——— v. Kingston	133
Holden v. Stanhope	310
Holdfast v. Thrustout	369
Holdmen v. Lomax	9
Holton, inhabit. King v.	238
Houlditch v Mist. in (Chancery)	43
Hudson v. Jones	201
Hunt, Argyle v.	305
Hunt v. Bourne	327
——, Simple v.	319
Hughes, Alvarez v.	78
Hungerford, Hellidge v.	371

I.

Ibbotson v. Beckwith	214
———, Hebright v.	155
Jenner, the King v.	229

INDEX OF CASES CITED.

Page.

Jocelyn, Fuller v. 54, 309
Johnſon, Leſſer v. 155
Jones v. Axen - 290
——, Hudſon v. 201
Jones's, Landen, caſe 46
——— v. Brookes - 266
——— v. Hammond - 369
——— v. Wilſon - 360
——— Weſtcomb v. - 270
Jordon, Clever v. 15
Judges, Reſolution of 232

K.

Kent v. Kent - 154
Killigrew, Nicolas v. 358
King's College Willmot v. 181
——— v. Andover, Corp. 184
——— v. Armagh, dean &c. 20
——— v Anyhoe, inhabit. 63
——— v Beckworth 123
——— v. Bennett - 168
——— v. Bewdly, Corp. 52, 317
——— v. Bolton - 12
——— v. Bond, Sir Harry 146
——— v. Bowes 139, 147
——— v. Buells - 240
——— v. Burridge 52
——— v. Charleſworth 14
——— v. Cheſter, biſhop 181, 184
——— v Clarehall 184
——— v. Davis - 173
——— v. Dublin, dean, &c. 20
——— v. Edwards 111
——— v. Elford 28
——— v. Ellam 13, 110
——— v. Elms - 229
——— v. Floyd - 82
——— v. Gawl - 25
——— v. Gibbs - 175
——— v. Glouceſter, mayor of 184
——— v. Guildford, inhabit. 4
——— v. Hammond 143, 145
——— v. Harding 167

Page.

King's v. Harwich, borough 276
——— v. Henly - 355
——— v. Heptinſtall, inhabit. 372
——— v. High Ferrers, Corp. 280
——— v. Holton, inhabit. 238
——— v. Jenner 229
——— v. King - 255
——— v. Kings College 184
——— v. Leper - 209
——— v. Litchfield and Coventry, biſhop of 267
——— v Liverpool, Corp. 184
——— v. London, Corp. 179
——— v. Moore 18
——— v. Norwich, biſhop 21
——— v. Norwich, Corp. 180
——— v. Penryn, Mayor 123
——— v Pierſon, & al 287
——— v. Pindar 125, 261
——— v. Pomfret, Mayor 105
——— v. Potter 175, 217
——— v. Sadler 174
——— v Shacklington 201
——— v Shaftſbury, Corp. 168
——— v. Shrewſbury, Corp. 171, 262, 320
——— v Sterne - 303
——— v Stoughton 138
——— v. Styles - 256
——— . Sutton 122, 167
——— v. Theed 84, 290
——— v. Thomſon 145
——— v. Tintaghen, Corp. 280
——— v. Trinity, College 183
——— v. Trotter 175, 217
——— v. Walker 178
——— v. Warwick, inhabit. 343, 344
——— v. Weſtwood 239
——— v. Wyatt 290
——— v. Wych 200
——— v. Wycker 290
——— v. Yeomans 141

	Page.
King v. Bolton	12
King, Greaves, v.	309
Kingston, Holbourne v.	133
Kirby, v. Saxille	287
Kitchen v. Manwayring	321
Kynaston v. Shrewsbury Corp.	171, 320

L.

Langley v. Baldwin	339
Layton v. Layton	315, 318
Leach v. Page	193
Lee v. Brasfield	246
Lee v. Ranfome	195, 199
—— v. Daniel	112
Leigh, Stanly v.	337
Leland, Cureden inhabit. v.	364
Leſſer v. Johnſton	155
Letgo on demiſe of Wheelar v. Pitt	369
Lewis, Wallis v.	319
Litchfield, biſhop, the King v.	357
Liverpoole, the King v.	184
Loffill v. Bancroft	891
Lomax v. Holdmen	9
London, City. v. Wood	90
—— Corp. the King v.	179
Londonderry's, Lord, Caſe	366
Lupton v. Atkinſon	176
Lutwych v. Wilcox	66

M.

Manwayring, Kitchen v.	321
Magworth, Davis v.	340
Man, Elliot v.	66
Marſhall, Blew v.	338
Marſon, Fanwick, v inhabit of	307
Marſton, Pariſh of, Anonymous v.	347
Martyr, Farthing v.	28, 292
Mattaire, Bourne v.	244
Mellam, Brinſlow v.	236
Merton, Daveniſh v.	377
Meſſenger v. Hobſon	27, 28, 292
Metcalf v. Row	107
Middleſex, inhabit. King v.	103
Millar v. Bradley	309
Minsfield, Brooke v.	7
Miſt v. Houlditch	43
Mitchell and wife v. Garrett	228
—— Wilkins v.	181
Montpealy, Walten v.	346
Moore, Robinſon v.	283
Morefoot v. Chivers	244
Morgan, Wigley v.	381
Morris, Bank of England v.	110
Mortimer, Wood v.	342
Moſtyn, v. Totty	112
Mouilton, Prince v.	193, 197
Munclere, Eaſt Goodawayv.	346
Muſgrave v. Nevenſon	317, 319, 323

N.

Neminick v. Farewell	320
Nevinſon, Muſgrave v.	317, 319, 323
Newbury, St. Mary's Reading, inhabit. v.	373
Nicolas v. Killigrew	358
Norman v. George	283
Norton, Rumball v.	390
Norwich, biſhop, King v.	21
——, Corp. Same v.	180

P.

Page v. Hayward	269
——, Leach v.	193
Palmer, Barbar v.	329
——, Strode v.	288
Pauler v. Delander	357, 359
Pauſly, inhabit. v. Chalton	373
Parkhurſt, Dormer v.	298
Parſons v. Gill	310
Paſſor, Dobbs v.	319
Peacock, Anonymous v.	161

	Page.
Pendrell v. Pendrell	9
Penryn, mayor, King v.	123
Pennil v. Wallis	380
Perry, Berry v.	375
Petcher, Baker v.	319
Peterborough, Lord Acres v.	88
Phillips, Smith v.	118
Phillip's Cafe	383
Pierſon, & al King v.	287
Pindar, King v.	125, 261
Pomfret, King v.	105
Pope, Griffith v.	189
Pitt, Letgo v.	319
Portman v. Cain	357
Potter, King v.	175, 217
Powell v. Ward	200
Prince v. Moulton	193, 197
Pyke v. Badmarring	236

R.

Radford, Rodd v.	246
Ranſome, Lee v.	195, 199
Reading, inhabit. Newbury v.	373
Reeve, Trundall v.	142
——'s, Franklyn v.	284
Renny, Harris v.	25
Richardſon, Done v.	193, 197
Rigden v. Hedges	197
Robinſon v. Moore	283
Rodd v. Radford	246
Row, Metcalf v.	107
Roſs, Cloſe v.	224, 237
Rumball, Norton v.	290
Ruſſel v. Corne	245

S.

St. Andrew, inhabit. Sir Bride's v.	9
St. Bride, St Andrew v.	9
St. Matthew, v. St. Margarett, inhabit.	350
St. Mary's, Reading Newbury v	373
St. John, Wapping Shadwell v.	307
St. Saviour, v. St. Margarett	10
St. Margaret v. St. Saviour, inhabit.	10
St. Margarett v St. Matthew	350
St. Nicholas, St. Peter v.	365
St. Paul, dean of, Bettſworth Dr, v.	42
St. Peter, v. St. Nicholas	365
Sadler, King v.	174
Saliſbury's, Lord, Caſe	231
Savile v. Kirby	300
Scatterwood v. Edge	269
Scott, Bellew v.	246
Shacklington, King v.	201
Shadwell, St. John Wapping, inhabit. v.	307
Shaftſbury Corp. King v.	168
Shaw v. Bull	212, 215
—— v. Weigh	339
Sherwin, Clargis v.	390
Shipway, Goodman v.	188
Shrewſburry, Corp. King v.	171, 262, 320
——— ———, Kynaſton v.	171, 320
Simple v. Hunt,	319
Smith v. Fuller	386
—— v. Phillips	318
Somerſet, Wharton, v. (duke of)	273
Somner, Acton v.	193, 198
Sparkes, Tully v.	386
Speed, Croſs v.	352
Stanhope, Holden v.	310
Stanley v. Leigh	337
Sterne, King v.	303
Stokelane v. Doulting, inhabit.	314
Stoughton, King v.	138
Strode, Palmer v.	288
Styles, King v.	256
Sunbridge, Heaver v.	346
Sutton, King v.	122, 167
Swetnam v Archer	59

INDEX OF CASES CITED.

Page.

T.

Taylor, Browne v. 338
Theed, King v. 84, 290
Thomas, Evans v. 12
Thomſon, King v 145
Thornby v. Fleetwood 107
Thruſtout on demiſe of Lady Lawley.
——— v. Holdfaſt 369
Thruſtout, Goodtitle v. 133
Tintaghen Corp. King v. 280
Totneſs Corp. v. Bowden 169
Totty, Moſtyn v. 112
Trinity, College, King v. 183
Trotter, King v. 175, 217
Trull, Wyndham v. 19
Trundall, Reeve v. 142
Tully, Sparkes v. 386

V.

Verne v. Verne 386
Vigars v. Vigars 66

U.

Underhill, v. ——— 247
Uſher's Caſe 187

W.

Wainright v. Bagſhaw 11
Waldon's, Sir L. Caſe 230
Walker, King v. 178
——, Woollaſton v. 366
Wallis, Lewis v. 359
Wallis, Pennil v. 380
Walter, Cowell v. 297
Walton v. Montpealy inhabit. 346
Warwick inhabit. King v. 343, 344
Ward, Powell v. 200
Ward, Cocklow v. 66
Warren, Greſwick v. 265, 271
Watkins, Damage v. 16
Weigh, Shaw v. 339
Wells, Crofts v. 368
Weſt Goodaway, Eaſt Goodaway v. 350
Weſtcomb, v. Jones 270
Weſthanning, Brightwell, inhabit. v. 63
Weſtwood, King v. 239
Wharton, Somerſet v. 273
Wheate, Sir Thomas, v. Gregory 51
Whitmore, Dutcheſs of Malborough v. 112
Widdrington v. Charleton 68, 142
Wilcox, Lutwych v. 66
Wigley v. Morgan 381
Wiley v. inhabit. 5
Wilkins v. Mitchell 181
Williams, Browne v. 134
Williamſon, Anderſon v. 29
Willmote, King's College v. 181
Wilſon, Jones v. 360
Wingfield, Cook v. 300
Wither, Wyndham v. 19
Wood, of demiſe on Cowhurſt Mortimur v. 342
Wood, London City v. 90
Woollaſtor v. Walker 366
Worceſter, biſhop, Sir John Bernard v. 69
Wyatt, King v. 290
Wych, King v. 200
Wycker, King v. 290
Wyndham's, Sir William Caſe 272
Wyndham, Trull v. 19
———, Wither v. 19
———, Anonymous v. 219

Y.

Yeates's Caſe 196
Yeomens, King v. 141

Trinity Term,

10, 11 Geo. II. 1737.

Memorandum, That *William Lee*, eſquire, one of the juſtices of the King's Bench, was made, in the laſt vacation, chief juſtice of the ſaid court, in the place of lord *Hardwicke*, (who was then conſtituted lord chancellor) and he was, about the ſame time, knighted. And Sir *William Chapple*, knight, his Majeſty's primier ſerjeant at law, was made, in this term, one of the juſtices of the King's Bench, in the room of lord chief juſtice *Lee*; and 20 *July*, in the ſame term, Mr. juſtice *Chapple* took his place in court.

The other juſtices of the court were Sir *Francis Page*, and Sir *Edmund Probyn*, knights.

The King againſt *Whiſkin.*

Mandamus to admit E. to the freedom of the town of C. (under a cuſtom that

MANDAMUS was granted for the admiſſion of one *Emery* to the freedom of the town of *Cambridge*: And the writ ſet out, that within the ſaid town there is a cuſtom, that every perſon being

every perſon who hath ſerved an apprenticeſhip in any trade with any freeman within the ſaid town, ſuch freeman living during the time of the apprenticeſhip in the ſaid town, and ſuch apprentice living with his maſter during his apprenticeſhip, hath a right to his freedom), ſtates that E. hath ſerved an apprenticeſhip with M. B. *the ſaid M. B. being a freeman of the ſaid town, and having lived within the ſaid town during ſuch apprenticeſhip.* The return ſtates that there are five certain court days kept yearly, upon which all perſons intitled unto and deſiring admiſſion have been admitted; and that on certain days a court was held, whereof notice had been given to E. and that he might then have been admitted, but he did not appear. Held, 1ſt. that by the writ it is ſufficiently averred that the maſter was, and continued a freeman during the apprenticeſhip. 2dly, were the writ defective in that reſpect, it is cured by the return, which admits E's qualification. 3dly, the return is ill for it does not ſtate that a perſon cannot be admitted but on thoſe five court days.

twenty-one years old, who hath ſerved an apprenticeſhip for ſeven years in any trade with any freeman within the ſaid town, ſuch freeman living during the time of the apprenticeſhip *in the ſaid town, and ſuch apprentice living with his maſter during his apprenticeſhip, hath a right to be admitted a freeman thereof; and it further ſet out, that *Emery* is twenty-one years old, and hath ſerved an apprenticeſhip in the trade of a gardener for ſeven years with *Matthew Blakney* deceaſed, the ſaid *M. B.* being a freeman of the ſaid town, and having lived during ſuch apprenticeſhip within the ſaid town; and therefore he the ſaid *Emery* hath a right to be admitted a freeman, &c. To this it was in effect returned, that there are five court days kept yearly at ſuch particular times in the *Guildhall* of the ſaid town for the admiſſion of freemen and other purpoſes, upon which days all perſons intitled unto and deſiring admiſſion have been admitted; and that 26 *April*, &c. a court was held, whereof notice had been before given to *Emery*, and that he might then have been admitted, but he did not appear, and therefore could not be admitted, but his name was then entred as a freeman, and his oath reſpited, &c.

P * 2

And it was objected by ſolicitor general *Strange* to the return, that it is ill; becauſe it does not mention, that the five court days are the only times when perſons may be admitted. And if it had been ſo expreſſed, it is very doubtful if it would have been good; as a Perſon intitled to his freedom hath a right to demand it whenever he pleaſes.

It was anſwered by Mr. *Deniſon*, that the return is ſufficiently certain: For returns to *Mandamus's* being now traverſable, there is no need of ſuch preciſe certainty in them as formerly. But ſuppoſing the return to be ill, he objected, that the writ is ſo too; becauſe it is not therein poſitively averred that *B.* the maſter of *Emery*, was a freeman, and continued ſo during

during the apprenticeſhip, which is neceſſary by the cuſtom; for the words are, "That *Emery* ſerved his "apprenticeſhip with *M. B.* being a freeman of the "ſaid town, and the ſaid *M. B.* having lived during "the apprenticeſhip in the ſame town:" And in the caſe *of a forcible entry, the words "being the P* 3
"freehold," are not ſufficient. It was therefore prayed, that the *Mandamus* be quaſhed.

The whole court were clearly of opinion, (1) That by the writ it ſufficiently appears that the maſter was, and continued a freeman during the apprenticeſhip. But ſuppoſing that the writ is in this point defective, it is cured by the return; as this admits the party's qualification. (2) That the return is ill; becauſe a perſon qualified hath a right to be admitted whenever he demands it, unleſs he be tied up to particular days: And here it is not ſaid, that a perſon cannot be admitted but on the five court days only. A peremptory *Mandamus* was therefore granted.

Note; A *Mandamus* was granted to the ſame defendant to admit one *Cook* a freeman of *Cambridge*, to which a return was made; and both the writ and return were penned in the ſame manner as the above: And a peremptory *Mandamus* was afterwards in this term awarded, for the ſame reaſon, which the court now went upon.

S. C. 2 Stra. 1077. Bur. S. C. 107. Caſ. T. Hardw. 391. Seſs. Caſ. 402.

The King againſt *the inhabitants of* Butley.

MOTION by Mr. *Lloyd* to quaſh an order of two juſtices for the removal of one *Chandler* from *Benhal* to *Butley*, and an order of ſeſſions confirming the ſame: And the queſtion was, whether the pauper, who went by certificate from *Benhal* to

A ſettlement is gained by renting a *wind-mill* of the *value* of 10*l.* a year. The tenants having given ſecurity for the rent, is no objection.

Butley, had gained a ſettlement there by renting a cottage of 2*l. per annum*, and alſo a wind-mill of 14*l. per annum*, for the payment of which laſt rent he had given ſureties.

And it was admitted by ſolicitor general *Strange*, who was counſel for *Butley*, that the renting of a wind-mill, as well as a water-mill, is ſufficient to gain
P * 4 a ſettlement. * *Salk.* 536. But he argued, that the giving ſecurity in the preſent caſe for the rent is an impediment to the ſettlement at *Butley*; becauſe this ſhews, that the pauper had no credit there: Whereas the ground of a perſon's gaining a ſettlement by taking a leaſe of ſuch a value is, that this is an evidence of his ability or credit. And it was urged by others on the ſame ſide, that the word [tenement] in the ſtatute of 9, 10 *W.* 3. *c.* 11. is to be underſtood only of lands, or of ſuch houſes as are habitable, and require ſtock or furniture; whereby it may appear that the tenant is not without ſome ſubſtance. And there is a difference between a water-mill and a wind-mill; for the firſt hath always an houſe accompanying it, but the other not: And in this caſe it ſeems probable, by the pauper's renting a cottage, that there was no houſe belonging to the mill.

It was anſwered by *Lloyd*, that the ſame degree of credit is requiſite for the getting ſureties, as for the payment of rent: And that the word [tenement] means land, or any thing built thereupon. And he cited *The King* and *the inhabitants of Guildford* (*a*), *Hil.* 8 *Geo.* 1. where it was held, that the renting of
(*a*) Str. 502. Say. 312. a mill, generally, gains a ſettlement.

The court (*ſc. Page*, *Probyn* and *Chapple*, juſt.) were of opinion, that a good ſettlement was gained at *Butley*; the only material thing in theſe caſes being the value of the thing rented †, and it does not

† See *Rex* v. *Fillongley*. 1 Term Rep. B. R. 458.—Bur. S. C. 140. That renting a *wind-mill* gained a ſettlement was expreſsly decided long before this caſe. V. *Inhabitants of New Elm*. Fort. 309. Caſ. Sct. & Remov. 4. But *Qu.* Whether this be not the ſame caſe with that in 2 Salk. 536. but differently reported.

ſignify

ſignify of what nature the mill is. The orders were therefore quaſhed.

The King againſt *the inhabitants of* Widworthy.

S.C.Caſ. T. Hardw. 392. Bur. S. C. 109. Seſs. Caſ. 401.

One, who upon his father dying inteſtate poſſeſſed himſelf of his cottage held for the reſidue of a term, and continued in it for 5 or 6 years until the leaſe expired, without taking out adminiſtration, did not thereby gain a ſettlement *Qu.* Whether he would have gained a ſettlement, had he taken out adminiſtration. The warrant of removal by the juſtices, and their adjudication being in one order, their names and ſeals being in the margin, the one againſt the adjudication, the other againſt the warrant; this is a ſufficient putting of their names and ſeals to the adjudication.

AN order was made by two juſtices, for the removal of *John Board* and his two ſons from *Widworthy* to *Farringdon*; which, upon appeal, was ſet aſide: And the caſe, as it appeared by the ſeſſions order, was this:

*The pauper being ſettled in *Farringdon* by ſervice, removed to *Widworthy*, and lived there with his father in a cottage-houſe of 30*s. per ann.* working as a day-labourer. The father died inteſtate, poſſeſſed of the ſaid cottage for the reſidue of a term, determinable on lives, at the rent of———and leaving the pauper and another ſon. The pauper's brother took his diſtributive ſhare of his father's eſtate in goods, and the pauper himſelf, after the father's death, continued in the cottage for five or ſix years, until the leaſe was determined: After which, and ſince the making the original order, he took out adminiſtration to his father. P *5

And it was moved by Mr. *Gundry*, to quaſh the order of ſeſſions; and he objected, (1) That rent being reſerved upon the leaſe of the cottage, this may be, for ought appears, to the full value thereof. (2) If the ſeſſions order is good as to the pauper's father, it is not ſo with reſpect to his children, who are adjudged by the original order to be ſettled at *F.* for it is

no

no reaſon for ſetting aſide that order as to them, that the father is ſettled elſewhere. But the principal objection was, (3) That at the time of the original order, and during the continuance of the leaſe, the pauper had no legal title to the cottage; for that being before his taking out adminiſtration, he was then plainly removable. 5 *Co.* 28. *a.* And even adminiſtration doth not alone give a title: And before the ſtatute of 31 *E.* 3. *c.* 11. an adminiſtrator could not recover.

To this laſt objection it was anſwered by Mr. *Cruwys*, that during the leaſe the pauper was irremovable, becauſe he had immediately on his father's death an intereſt in a moiety of the cottage veſted in him by the ſtatute of diſtributions; and afterwards, by the agreement with his brother, in the whole; and conſequently his abode there gained a ſettlement. And he cited the inhabitants of *Wiley* and (*a*)—— *Mich.* 11 *Geo.* 1. where a poor man having built a houſe upon waſte-ground belonging to *the lord of a manor, it was agreed between the lord and cottager, that he ſhould have a leaſe for years of the cottage, and the money deſigned for the purchaſe was depoſited in a third perſon's hands; but before any leaſe was made, the cottager died, and his daughter entred into and occupied the cottage for ſeveral years: And the court held, that though there was never any actual leaſe, but a contract only, yet this houſe gained a ſettlement for the daughter. But the ground of this determination was, (as was ſaid by *Gundry*) that there was a deſcent, and alſo ſo long a poſſeſſion, that the lord could not recover the houſe but by a writ of right.

(*a*) *Aſhbrittle.* Stra. 608. 8 Mod. 287. 2 Seſs. Caſ. 121. pl. 115.

P* 6

The court (*ſc.* *Page*, *Probyn* and *Chapple*, juſtices) were clear of opinion, that the pauper had gained no ſettlement

ſettlement at *W.* at the time of making the original order, becauſe he then was plainly removable, as he had not taken out the adminiſtration. And *Page* juſt. ſaid, that if he had been then adminiſtrator, it would not have been ſufficient; becauſe he would not, in ſuch caſe, have had the cottage in his own right, but only as a truſtee. But as to this point, *Probyn* juſt. inclined to the contrary.

V. *Rex* v. St. *Michael's* Doug. 609. Cald. 110. *Rex* v. *North Curry*. Cald. 137. *Rex* v. *Sewell*. Bur. S. C. 436. *Rex*. v. *Cald. Afton*. Bur. S. C. 444.

It was hereupon objected by Mr. *Cruwys* to the original order, that the juſtices hands and ſeals are not put to the adjudication, nor is it ſo expreſſed to be in the order.

But the warrant and adjudication being in one order, and the names and ſeals being put in the margin, the one againſt the adjudication, and the other againſt the warrant, the court held this to be well enough; and therefore quaſhed the ſeſſions order only.

* *Surby and his wife* againſt *York.*

S. C. Caſ. T. Hardw. 392.

P * 7

MOTION was made laſt term, for a prohibition to a ſuit in the ſpiritual court for calling a woman *whore*, upon a ſuggeſtion, that all actions for words ſpoken in *London* are triable there, and that whores in *London* are there puniſhable by carting and whipping; and alſo that this cuſtom was pleaded below, and denied: And it appeared by the recital of the libel in the ſuggeſtion, that the words were ſpoken in the pariſh of *St. Bridget*, otherwiſe *Brides* in *London*, or in the parts near adjacent. A rule to ſhew cauſe was thereupon granted; and it was now argued *contra* by ſerjeant *Hawkins* and Mr. *Mallory*; (1) That two matters are here ſuggeſted, *viz.* the cuſtom

Prohibition refuſed after ſentence upon a libel for calling a woman a whore, in *London*; it not appearing upon the proceedings, or by affidavit that the words were ſpoken there. V. poſt. 299.

cuſtom and denial of the plea; one of which is temporary, and the other abſolute; and therefore they ought not to be joined. 6 *Mod.* 308. (2) The truth of the ſuggeſtion ought to be verified by affidavit. *Salk.* 549, 551. *Skin.* 20. (3) It ought to have been alledged in the ſuggeſtion itſelf, that the words were ſpoken in *London*; whereas this is not mentioned any where but in the recital of the libel. 1 *Vent.* 10. 2 *Lutw.* 1043. [But *per cur'*: This is the conſtant form; and if it appears on the libel, it is ſufficient.] (4) The party is too late in the preſent application; becauſe, though the motion was made before ſentence, yet the rule to ſhew cauſe was not ſerved till after ſentence; ſo that the juriſdiction of the ſpiritual court is affirmed. And the difference is, that where the ſpiritual court hath no cogniſance, a prohibition may be prayed after ſentence; but otherwiſe it is where it appears on the face of the libel that they have cogniſance. *Cro. Jac.* 429. 2 *Mod.* 271. *Carth.* 213. *Comb.* 448. *Argyle* and *Hunt*, (*a*) *Trin.* 9 *Geo.* 1. A prohibition was there prayed after ſentence, and held too late. And the ſame point was determined in *Brook* and *Minsfield* (*b*) in the ſame term. (5) It doth not appear by the recital of the libel in the ſuggeſtion, that the words were ſpoken in *L.* they being mentioned to be * ſpoken "in the pariſh of *St. Bridget* in *London* "or in parts near adjacent:" So that poſſibly they might be ſpoken out of *London*.

(*a*) poſt 305. Stra. 187. Fort. 347.

(*b*) *Qu. Cook* v. *Wingfield*. Fort. 347. Stra. 555.

P * 8

Upon this laſt objection the rule was enlarged, in order to give the party time to move for an amendment of the ſuggeſtion. And this being afterwards prayed and granted, and the ſuggeſtion amended, the caſe was ſtirred again another day in this term. And then an affidavit was produced on the other ſide, that neither the plaintiff below, nor his proctor, could be found before ſentence to be ſerved with the rule.

But

But the court ſaid that this would not help the caſe, for the ſpiritual judge might have been ſerved with the rule; and therefore this is to be conſidered as a motion after ſentence. And the whole court (*ſ. Page*, *Probyn* and *Chapple* juſtices) were of opinion, that if it had appeared on the libel, or the proceedings below, that the words were ſpoken in *L.* the prohibition ought to ſtand, becauſe then it would appear that the matter is out of the juriſdiction of the ſpiritual judge; as this court muſt take notice of the cuſtoms of *London* (*c*). But this not appearing on the proceedings below, they ſaid it was neceſſary to verify the fact by affidavit; which they refuſed now to permit the party to do; and therefore diſcharged the rule†.

Poſt. 11.

(*c*) If they have been certified. V. *Blacquiere* v. *Hawkins* Doug. 363.

† See *Argyle* v. *Hunt*, ſupra. cit. *Cook* v. *Windfield*, Stra. 555. *Hinds* v. *Thompſon*. poſt. 299. *Driver* v. *Driver*, poſt. 305. *Theyer* v. *Eaſtwick*. 4 Bur. 2032. *Buggin* v. *Bennett*. 4 Bur. 2035. *Head*. v. *Winter*, Bunb. 312. *Full*. v. *Hutchins*, Cowp. 422. *Caton* v. *Burton*, Cowp. 330. *Dawſon* v. *Wilkinſon*, poſt. 11.

The King againſt *the inhabitants of* Bedell.

S. C. 2 Stra. 1076. Caſ. T. Hardw. 379. Bull. N. P. 112.

AN order of baſtardy was made by two juſtices reciting, that whereas *Elizabeth Sharpleſs*, the wife of *Richard Sharpleſs*, *anno* 1733. was delivered of a child in *Bedell*, and that on the examination of the ſaid *Elizabeth*, and on other proof, it appeared, that her ſaid huſband for ſeven years and nine

Children born in wedlock are baſtards if the huſband had no acceſs to his wife. The wife is not competent to prove that; but the order of the juſtices reciting that it ſo appeared on the examination of her *and on other proof*, this is ſufficient. The court will preſume that the other evidence was legal.

months

P * 9 months before that time had not cohabited *with, or had any acceſs to her; and that the ſaid *Elizabeth* did not know whether he was alive or dead; and therefore it is adjudged that the ſaid child is a baſtard, and that *Chriſtopher Moor* is the father. And upon appeal an order of ſeſſions was made, which, after reciting the original order ſet out, that it appeared farther on the evidence of the ſaid *Elizabeth*, that 1728. ſhe was married to *Richard Sharpleſs* in a barn by perſons unknown; and alſo that it appeared by the certificate of the commiſſary general, and the evidence of *E. C.* that one *Richard Sharpleſs* was muſtered in the guards *anno* 1733. and continued there from that time until —— but the ſaid *E. C.* could not tell whether the ſaid *Richard Sharpleſs* was the huſband of the ſaid *Elizabeth*. And it not appearing that her huſband was dead, therefore the ſeſſions quaſhed the firſt order.

Motion by ſolicitor general *Strange* to quaſh the order of ſeſſions, and confirm the original order. And it was argued by him and Mr. *Deniſon*, that if the huſband in this caſe be actually living, it is not material; for as he had no acceſs to his wife for ſeven years and nine months, the children born in that time are to be conſidered as baſtards: And they cited the following caſes. *Pendrell* and *Pendrell*, (*a*) *Hil.* 5 *Geo.* 2. This was an iſſue of legitimacy directed out of chancery, and tried before lord chief juſtice *Raymond*; and it being proved that the huſband had no acceſs to the wife, though he was always in *England*, it was held, that the child was a baſtard: And the court of chancery acquieſced in the determination. *Lomax* and *Holmden*, (*b*) *Mich.* 6 *Geo.* 2. Upon an iſſue of legitimacy it was agreed by the court, that if a huſband is impotent, though he continue in the houſe with his wife, the iſſue may be baſtardized. *The inhabitants of St. Andrew* and *St. Bride*, (*c*) *Hil.* 3 *Geo.* 1. agreed, upon debate, that if a Huſband

(*a*) 2. Stra. 259. 3. P. W. 276.

(*b*) 2. Stra. 940.

(*c*) Stra. 51. 1 Seſs. Cas. 117. pl. 113.

Huſband hath no acceſs to the wife, her iſſue are baſtards.

It was admitted by Mr. *Marſh* and Mr. *Barnardiſton* on the other ſide, that the law is now ſettled, as has been mentioned; that the iſſue of a married woman may be * baſtardized, though the huſband be P * 10
within the four ſeas; contrary to the old rule, *Co. Lit.* 244. *a.* but then (they urged) the evidence ought to be very plain; as particularly, that the wife only can be a witneſs of the act of incontinency. But in the preſent caſe her evidence only, that the huſband had no acceſs, (which is the ſole proof the firſt order is founded on) is inſufficient: And for this defect in that order the ſeſſions might quaſh it. That this evidence is not ſufficient, was held in a caſe in lord *Holt*'s time, and in the late caſe of *The King* and *Reading* (*d*) ‡.

(*d*) Cas. T. Hardw. 79. 2 Sel. Cas. 286. pl. 175. Infra. n.

The court (*ſc. Page*, *Probyn* and *Chapple*, juſtices) were clearly of opinion, (1) That though the evidence of the wife alone in this caſe is not ſufficient, yet the original order is good: it appearing to be made not only on her teſtimony, "but on other "proof:" And this, it muſt be intended, was legal evidence. (2) That the ſeſſions order is ill; becauſe the only thing they have proceeded upon, is the life of the huſband: And this is not material, as there was no acceſs by the huſband to the wife; which this order admits. And *Page* juſt. cited *The inhabitants of St. Margaret Weſtminſter* and *of St. Saviour Southwark*; where after ſolemn debate it was held, that a married woman may have a baſtard if her

‡ *The King* and *Reading*. *Mich.* 8 *Geo.* 2. Motion to quaſh an order of baſtardy made on the evidence of the mother of the child, who was a married woman: And the court were of opinion, that though her evidence of the criminal converſation is good for the ſake of neceſſity, yet there ought to be other proof of the want of acceſs by the huſband to the wife. (A) See *Rex* (A v. *Reed*. Say. 61. 1 Wils. 340. *Goodright* v. *Moſs*. Cowp. 591.

huſband

huſband hath no acceſs to her, though he be in *England*. Beſides, the evidence of the marriage and of the life of the man, as ſet out in the ſeſſions order, is imperfect and inſufficient.

Upon this, it was prayed by Mr. *Marſh*, that he might be at liberty to except to the original order. But this was refuſed, becauſe the perſon charged was not in court. And though it was earneſtly deſired, that the rule to ſhew cauſe be enlarged, in order to bring up the party, and except to the firſt order; to which *Probyn* juſt. inclined; but *Page* juſt. ſtrongly oppoſing it, the juſtices order was now confirmed, and the other quaſhed.

S. C. Cas. T. Hardw. 381.

P * 11

**Dawſon and others* againſt *Wilkinſon and others*.

Prohibition granted, after ſentence to compel the preſent Church-wardens to make a rate to reimburſe the late church-wardens. No affidavit required.

MOTION for a prohibition, to a ſuit in the ſpiritual court, by the late churchwardens againſt their ſucceſſors, the preſent churchwardens, for an allowance of their accounts; in which an account was decreed, and alſo that the preſent churchwardens ſhall make a rate for reimburſing the others, what was due to them on their account.

It was argued by Mr. *Makepeace* againſt the prohibition, (1) That as the ſpiritual court has a juriſdiction as to the principal, this extends to every thing that is incidental thereto, which the making a rate here is. *Yelv.* 172, 173. And churchwardens laying out money by the direction of the pariſh are without remedy, unleſs it be in the eccleſiaſtical court. (2) This being after ſentence, the fact ought to be verified by affidavit.

To

To this it was anſwered by Mr. *Filmer*, (1) That the ſpiritual court hath plainly no power to order a rate to be made by the preſent churchwardens for reimburſing the former; which cannot be done without the pariſh, for they can only order an account. 2 *Roll. Rep.* 73. And ſo it was determined in *Wainwright* and *Bagſhaw*, *Eaſt.* 7 *Geo.* 2. † and many other caſes. Here alſo ſome of the items of the account are diſallowed; which the court below cannot do. (2) As it appears on the face of the ſentence, that there is a want of juriſdiction, there is no need of an affidavit.

*And the court (*ſc. Page*, *Probyn* and *Chapple*, juſtices) were clearly of the ſame opinion upon both the points; and they cited *Tawny*'s (*a*) caſe as to the firſt. And therefore a prohibition was granted. P * 12

(*a*) 2 Salk. 531. 2 Ld. Ray. 1009. 6 Mod. 97.

See *Rex* v. *Wavell* v. *al'* Doug. 111. *Rex* v. *Churchwardens of Rotherbithe* 8 Mod. 339. *Stephens* v. *Evans*, 2 Bur. 1152.

Bean againſt *Elton*.

S.C. 2 Stra. 1077. vide.

ACTION on the caſe was brought againſt the defendant for money due for lodgings, and alſo for money lent; and the plaintiff obtaining an interlocutory judgment, he executed a writ of inquiry, and entered up final judgment, and ſued out a *capias ad ſatisfaciendum*, upon which the defendant

New writ of enquiry &c. ordered to be made, on the loſs of the former.

† *Wainwright and others* againſt *Bagſhaw and others*, (*a*) *Eaſt.* 7 *Geo.* 2. Motion to prohibit a ſuit in the ſpiritual court againſt churchwardens for an account, to which they pleaded an account paſſed before the miniſter and "majority of the inhabitants and pariſhioners according to law:" And it was held, that the plea muſt be taken to mean pariſhioners inhabiting in the pariſh, and is not to be underſtood disjunctively: and conſequently as an account has been well paſſed, the prohibition ought to go: which was ordered accordingly. (A).

(*a*) 2 Stra. 974. 2 Barnard. B. R. 421.

was

was taken up, and afterwards he died in execution. The interlocutory judgment was docqueted; but the final judgment and taxation of coſts being loſt, it was now moved by ſolicitor general *Strange*, to enter up a final judgment: And he cited theſe caſes: *King* and *Bolton* (a). A writ of error was brought in parliament of a judgment in prohibition; and the record was pick'd out of the attorney's pocket, as he was going to the houſe of lords to examine it; and leave was given to make out another record from the paper.——And *Grano*, (b) *Trin.* 9 *Geo.* 1. The ſame thing was there done, in an action on the caſe. *Evans* and *Thomas*, (c) *Eaſt.* 2 *Geo.* 2. There the roll was docqueted; and the record afterwards loſt; and a new one was permitted to be filed. And *Page* juſt. remembered a caſe in the Exchequer, when he was one of the barons, where upon a motion, either for a new trial, or in arreſt of judgment, as the attorney was bringing up the *poſtea*, it was pick'd out of his pocket; and leave was given to have recourſe to the clerk's minutes.

(a) Stra. 141. Fort. 355.

(b) *Needham* v. *Grano*, or *Granger* cited, Stra. 141. 2 Kely. 106.

(c) 2 Stra. 833.

P * 13 **Chapple* juſt. The plaintiff may have a writ of inquiry *nunc pro tunc*; but he muſt have a new judgment.

A rule was therefore granted to ſhew cauſe, why there ſhould not be a writ of inquiry: And this rule was afterwards made abſolute, without any cauſe ſhewn *contra*.

In *Rex* v. *Atkinſon*, T. 25. Geo. 3. after conviction for perjury and a writ of error to the Lords, whereon error was aſſigned in the want of a *Venire* and *Diſtringas*; the *Venire* was not to be found. Whereupon on the motion of *Arden*, attorney general, a rule was made for making out a new one. He cited *Stone* v. *Overton* Barnes 14, and 1 Ld. Ray, 695. MSS. See 2 Kely 106.

French

French as well, &c. againſt *Whitfield.*

ACTION on the ſtatute of 10, 11 *W.* 3. *c.* 17. for keeping a houſe in *Covent-garden* where the game of pharo is permitted to be played; to which the general iſſue was pleaded. And the cauſe having been carried down by proviſo, but poſtponed, for trial, on account of its length, it was now moved by ſerjeant *Burnet*, for leave to amend the declaration, by inſerting *Convent-garden* inſtead of *Covent-garden*, and ſtriking out the letter [s] at the end of the word [*Paul's*], and by making other alterations of the ſame kind. And he cited *The King* and *Ellam*, (*a*), *Trin.* 7, 8 *Geo.* 2. where, in a *quo warranto*, leave was given to amend the plea, after iſſue joined upon part thereof, and a demurrer to other part.

Declaration in a *Qui tam* action allowed to be amended after the cauſe had been carried down by proviſo and poſtponed; leave given to the defendant to plead *de novo.*

(*a*) 2 Stra. 976. Cas. T. Hardw. 42. 2 Barnard. B. R. 445. poſt. 110. n.

On the other ſide it was argued by ſolicitor general *Strange* and others, that this cauſe having been carried down by proviſo, it is materially different from all other caſes where amendments have been allowed, as that circumſtance ſhews a great laches in the plaintiff. But ſuppoſing that the liberty of amending be here allowed, it was inſiſted, that the defendant ought to be ſuffered to plead *de novo.*

To this it was objected, that the amendments prayed make only a minute variation, and do not alter the nature of the defence. *Style's Prac. Reg.* 29. And where a *declaration is amended, the liberty of pleading *de novo* is not always granted. *Salk.* 50. *King* and *Charleſworth*, (*b*) *Trin.* 3 *Geo.* 2. Information for forging a warrant of attorney; and on the day of trial, leave was given to amend the information in ſetting out the date of the warrant.

P * 14

(*b*) 2 Stra. 871. 1 Barnard B. R. 342.

The

The whole court (*Lee* C. J. *abſente*) were of opinion, (1) That it does not materially differ this caſe from others; that here the cauſe was carried down by proviſo, and therefore the amendment ought to be allowed. (2) That the defendant ought to be at liberty to plead *de novo*: For perhaps the reaſon of his pleading as he has done was, that the declaration is ſo ill, that the plaintiff could not poſſibly recover thereon; which is the preſent caſe, as the pariſh is miſtaken: And poſſibly the amendments prayed may make the declaration ill, and the defendant may chuſe to demur. The general practice alſo is for a defendant, in theſe caſes, to plead *de novo*; and the rule always is for amending, without mentioning any thing about pleading *de novo*; which is underſtood. And Mr. *Munday*, clerk of the rules, ſaid that the form of the rule was always ſo.

The plaintiff therefore had leave to amend his declaration on payment of coſts, with a liberty for the defendant to plead *de novo*.

The King againſt *Cann*.

Quo warranto for holding a Court-leet, refuſed. *Rex* v. *Bridge*, 1 Blackſt. 46 *contra*.

MOTION by Mr. *Taylor*, for a *quo warranto* againſt the defendant, for holding a court-leet in a manor belonging to him: And this motion was made at the inſtance of one *Hill*, who was lord of the hundred where the manor is, and holds a court there.

On the other ſide it was argued by the ſerjeants *Draper* and *Parker*, and others, that the defendant
P * 15 derives a clear *title to the court-leet, under letters patent of *E.* 6. And though there has been a non-

uſer

ufer, yet the franchiſe is not diſſolved, there having been no judgment of ſeizure. Beſides, here is only a private right in queſtion; and for this reaſon a *quo warranto* has been always refuſed in the caſe of warrens. 2 Ld. Ray. 1409. Str. 637. S. C. Caſ. T. Hardw. 261.

And for this laſt reaſon the court (*Lee* C. J. *abſente*) refuſed to grant the information; and they ſaid, the matter may very properly be tried in a civil action: As for inſtance, in an action brought by the lord of the hundred againſt any perſon attending the manor-court, for not attending the hundred-court; and in other actions.

Robinſon againſt *Nicholls*.

S.C. 2 Stra. 1077.

ACTION on a judgment obtained againſt defendant for 9*l.* debt; and the debt, with the addition of coſts, amounting to more than 10*l.* the defendant was arreſted. And it was moved by ſerjeant *Burnett*, that he may be diſcharged out of cuſtody on filing common bail; and he cited *Clever* and *Jordan*, (*a*) *Hil.* 8 *Geo.* 2. Where debt was brought on a judgment, in order to prevent the defendant's taking advantage of the lords act, which he might have done upon an execution; and the original debt, with the coſts, (but not without) amounting to more than 10*l.* the defendant was arreſted, and put in bail; and afterwards was ſurrendered in diſcharge of his bail: And after that he was ordered to be diſcharged out of cuſtody, on filing common bail.

In debt on a Judgment for 9*l.* debt, which with the coſts exceeded 10*l.* the defendant diſcharged on common bail, tho' he had put in ſpecial bail.

(*a*) Cited in *Hall* v. *Howes* 2 Stra. 1039. Caſ. T. Hardw. 244.

It was admitted by ſolicitor general *Strange* on the other ſide, that where the original debt doth not amount to 10*l.* but that, with the coſts, amounts to

more, the defendant is not obliged to put in ſpecial
* P 16 bail; and ſo it was * determined in *Damage* and *Watkins*, *Eaſt.* 7 *Geo.* 2.‡ and another caſe ſince. But he argued, that here bail being put in above, and the defendant having voluntarily ſurrendered himſelf, [and ſo it was ſworn] it is now too late for him to pray a diſcharge. And he likened it to the caſe of an executor, who in a writ of error put in bail, which he was not obliged to do; and afterwards it was moved to diſcharge the bail, but denied.

Laſerre v. *Johnſon*, 2 Stra. 745. 2 Ld. Ray. 1459.

Per cur' (*Lee* C. J. *abſente*): It is moſt probable that the bail below put themſelves in as bail above, and afterwards ſurrendered the defendant. But ſuppoſing that it was all the defendant's own act, it makes no difference, the whole being compulſory, as it aroſe from the wrongful proceeding at firſt. He ought therefore to be diſcharged; and this is the conſtant practice where the debt, for which the judgment was obtained, is under 10*l.* And a rule was granted accordingly*.

‡ *Damage* and *Watkins*. In debt on a judgment, upon which a writ of error was brought, it was moved to ſtay the proceedings pending the writ of error, and that common bail be accepted; the original debt being only 3*l.* though, with the coſts, it amounted to 14*l.* and a rule was granted accordingly. (A) S. C. 2 Stra. 975. by name of *Gammage* v. *Watkin*.

* See Cowp. 128. *Palmer* v. *Needham*, 3 Bur. 1389.—*Creſſey* v. *Kell*, 1 Wils. 120. *Belcher* v. *Gibbs* 4 Bur. 2117.—*Nightingale* v. *Nightingale* 2 Blacſt. 1274. *Buſh.* v. *Bates*, 5 Bur. 2660.

Tomſon

Tomſon againſt *Browne.*

Proceedings ſet aſide, after Judgment and notice of a writ of inquiry; the plaintiff's name being omitted in the writ in the commencement of the action.

MOTION to ſet aſide proceedings, in an action for goods ſold and delivered, becauſe the plaintiff's name is omitted in the writ. To this it was objected by Mr. *Marſh*, that it is now too late to make this application, the defendant being in court, by the plaintiff's having entered an appearance for him, and by having given him notice of a declaration being left in the office: And here alſo judgment hath been ſigned, and notice of a writ of inquiry given. And he cited *Evans* and *Defevre*, in the laſt term. †

*But *per cur'* (*Lee* C. J. *abſente*): As the plaintiff is not named, this is no proceſs at all; and therefore the defendant may apply at any time to ſet aſide the proceedings: But otherwiſe it is where the ſervice of the writ is irregular only; for there the party muſt come as ſoon after notice thereof as poſſible. * P 17

A rule was therefore granted for ſetting aſide the proceedings.

† *Evans* and *Defevre*. Motion by Mr. *Vaughan* to ſet aſide proceedings, becauſe in the copy of the writ the defendant was named *Daniel* inſtead of *Samuel*; and he was alſo named *Daniel* in the notice of the declaration being filed againſt him: But the motion being made after notice given for executing the writ of inquiry, the court refuſed to grant it; and they ſaid, the defendant ſhould have pleaded the miſnomer in abatement. (A) (A)

Wareing againſt *Potter.*

The Court will not ſtay proceedings in *treſpaſs*, till the plaintiff pays the coſts of not proceeding to trial according to notice; tho' the plaintiff be a pauper.

MOTION by Mr. *Deniſon*, to ſtop proceedings in an action of treſpaſs brought by a tenant againſt his landlord for a diſtreſs, until the plaintiff, who is a neceſſitous perſon and abſconds, hath paid the coſts for not going on to trial according to notice: And he urged, that formerly the court would not grant ſuch rule in ejectment, where on a nonſuit in one action, another is afterwards commenced in a different court from that in which the firſt is brought, (1 *Sid.* 279.) but this hath been ſince got over, in order to reſtrain perſons from vexing others with new actions. *Salk.* 255. The ſame reaſon holds good here, as the rule for coſts cannot be enforced againſt the plaintiff by an attachment, on account of his indigency: And this is alſo an action brought merely for vexation.

But *per cur'* (*Lee* C. J. *abſente*): Such a rule is never granted in any caſe but that of ejectment, where it is always done: And if the plaintiff had been a pauper, all that the court could have done, is to diſpauper, him. Motion therefore denied.†

Style 386.

† The Court have ſince ſtaid proceedings, till the coſts of a former action were paid, in other caſes beſides Ejectment. See *Weſton* v. *Withers*. 2 Term Rep. B. R. 511. *Moulton*, Qui tam, v. *Bingham*. ibid. n. *Baldwin* v. *Richards*. ibid. n. See *Melchert* v. *Halſey* and others, 3. Wils. 149. 2 Blackſt. 741.

The

*The King against *Piercy.* *P 18

MOTION by Mr. *Gundry*, to quash a conviction for driving a waggon with six horses, contrary to the statute of 5 *Geo.* 1. *c.* 12. because it appears that the conviction is founded only on the evidence of the person who seized the horse, which is insufficient, as he is to take the benefit thereof. And the words of the act are till the person seizing "shall make proof upon oath of the offence, &c." And he cited *The King* and *Moore*, *(a) Mich.* 9 *Geo.* 2. Where an information was prayed against a justice of peace, for refusing a precept upon this statute: And the court was of opinion that he acted rightly, because the person who seized was the same who informed.

A conviction founded only on the evidence of the person intitled to the benefit of it, quashed.

(a) Cas. Temp. Hardw. 176.

A rule to shew cause was now granted: And afterwards this term it was made absolute, without any opposition. And *Page* just. said, that this was a clear objection; and it hath been often determined, that the evidence only of the person seizing is insufficient. ‡

† S. P. *Rex* v. *Tilly*. Stra. 316. *Rex* v. *Collins*, cited Cas. T. Hardw. 176. *Rex* v. *Blaney*. post. 240. *Rex* v. *Stone*, 2 Ld. Ray. 1545. Contra *Jennings* v. *Hanley*: 3 Mod. 114.

Adams against *Broughton.*

S. C. 2 Stra. 1078.

AN action of trover was brought by the present plaintiff against one *Mason*, wherein he obtained judgment by default, and afterwards had final judgment;

In trover the defendant discharged on common bail; the plaintiff having recovered in another action of trover for the same goods against another person; for that judgment altered the property of the goods.

The Court will not ſtay proceedings in *treſpaſs*, till the plaintif pays the coſts of no proceedin to trial according t notice; th the plaint be a pauper.

Style

judgment; whereupon a writ of error was brought. And another action of trover was now brought by the ſame plaintiff, and for the ſame goods for which the firſt action was brought, againſt *Broughton*. It was thereupon moved by ſolicitor general *Strange*, on an affidavit that the goods converted amounted to more than 10*l*. that the defendant may be held to ſpecial bail. And he compared this to the caſe of an indorſee of a bill of exchange, who may bring * an action both againſt the drawer and indorſer, and hold them both to bail: And he cited the caſes of *Wyndham* and *Wither*, and *Wyndham* and *Trull*, (*a*) *Eaſt*. 8 *Geo*. 1. Where upon a motion to ſtay proceedings it was held, that an indorſee of a bill of exchange may bring an action thereon, both againſt the indorſer and drawer; and the court is only to ſee that the plaintiff hath but one ſatisfaction. So here the plaintiff may ſue both *Maſon* and the preſent defendant, and is intitled to the ſame proceſs againſt the laſt, as if the action had been brought againſt him only. And he urged, in anſwer to an objection made by *Page* juſt. that by a judgment obtained by the plaintiff in trover, the goods are become the defendant's; that a ſpecial property only is thereby veſted in him: And in the preſent caſe, it is evidence only of a property as between the plaintiff and *Maſon*, but not as between the preſent parties.

* P 19

(*a*) Stra. 515.

But *per cur'* (*Lee* C. J. *abſente*): The property of the goods is intirely altered by the judgment obtained againſt *Maſon*, and the damages recovered in the firſt action are the price thereof; ſo that he hath now the ſame property therein as the original plaintiff had; and this againſt all the world. And therefore the motion was denied. Mr. *Clive* jun. for the defendant urged, that the plaintiff is not intitled to ſpecial bail, becauſe then he would have bail upon bail.

2 Cro. 73. 74. Yelv. 67. Moor. 762. S. C.

Hughes

Hughes againſt *Burgeſs*.

S. C. Cas. Temp. Hardw. 394.

IN account, the defendant pleaded *quod plene computaſſet*; upon which iſſue was joined, and a verdict found, that he had not accounted; and the jury alſo find damages: Whereupon the plaintiff entered up final judgment, and ſued out a *fieri facias* for the damages. And it was now moved by ſolicitor general *Strange* to ſet aſide this execution, and to have the money levied reſtored: * And it was urged by him and Mr. *Deniſon*, that the plaintiff was not intitled to a judgment for damages, but only to a judgment *quod computet*; which is in the nature of an award only, and upon which it has been often determined, that a writ of error doth not lie. The conſequence hereof is, that the execution is taken out in the middle of the ſuit; which cannot be done. That this judgment is ill, appears by *Cro. El.* 82.

In account, upon the plea of *plene computavit*, the plaintiff gets a verdict with damages; enters up final Judgment and ſues out a *fi fa*. The Judgment and execution ſet aſide on motion, for the plaintiff was only intitled to Judgment *quod computet*.

On the other ſide it was argued by Mr. *Taylor*, that this is to be conſidered as a final judgment, by reaſon of the defendant's falſe plea; and therefore it is good for the damages. *Cro. El.* 82. S. C. 3 *Leon.* 192, 230. S. C. 1 *Lutw.* 47. Beſides, if this judgment is erroneous, a writ of error ought to be brought; but a motion is improper.

* P 20

The whole court (*Lee* C. J. *abſente*) were clearly of opinion, (1) That this judgment is wrong, it being final; whereas the plaintiff was intitled to a judgment *quod computet*, which is interlocutory only. (2) That the execution ought not to be ſet aſide whilſt the judgment remains. (3) That the judgment being irregular, it may be ſet aſide on motion. And therefore a rule was granted for ſetting aſide as well the judgment as the execution.

The

S. C. 2 Stra. 1082.

The King againſt *the biſhop of* Saliſbury.

A *mandamus* lies to inſtall into a prebend.

MOTION by ſolicitor general *Strange*, for a *mandamus* to Dr. *Sherlock*, biſhop of *Saliſbury*, commanding him to inſtall Mr. *John Clark* into a prebend belonging to the cathedral church of *Saliſbury*; the ſaid *Clark* having been preſented thereto by the crown, and the biſhop having refuſed to admit him: And the ſolicitor general cited the caſes of *The King* and *the dean and chapter of Armagh*, and *The King* and *the dean and chapter* of *Dublin*, (*a*) where ſuch *mandumus's* were granted; and alſo *The* **King* and *the biſhop of Norwich*, *Trin.* 4 *Geo.* 1. (*b*) Where a *mandamus* was granted to inſtall Dr. *Sherlock* himſelf into a prebend belonging to the church of *Norwich*. And the court (*Lee* C. J. *abſente*) now granted a rule to ſhew cauſe, *&c.* which Mr. *Maſterman*, one of the clerks of the crown-office, ſaid was always the practice on theſe particular *mandamus's*. †

(*a*) 1 P. Wms. 348. Stra. 536. 2 Bro. P C. 554. 8 Mod. 27.

* P 21

(*b*) Stra. 159. Fort. 222. Poſt. 185.

† It appears from *Strange's* report, that the writ was ordered, but never iſſued, the parties agreeing to refer the diſpute.

Smith againſt *Reynolds*.

Rule granted to arreſt judgment in treſpaſs for aſſault, the declaration beginning with *Quod cum*. avoided by

MOTION in arreſt of judgment, in an action of aſſault and battery, becauſe the declaration begins with the words [*quod cum*], and ſo goes on by way of recital, without any averment.

S. P. *Amyon* v. *Shore*, Stra. 621. In 2 Stra. 1151. 1162. the objection was filing a right bill; and then amending the declaration by it.

And

And the whole court (*Lee* C. J. *abſente*) ſeemed inclined to grant an abſolute rule, unleſs cauſe, *&c.* but at the inſtance of Sir *Thomas Abney*, they granted a rule to ſhew cauſe, *&c.* And by *Probyn* juſt. If this was a cauſe in the Common Pleas, the declaration would be well enough, becauſe the proceedings there being by original, it would be a recital of that which is right: But otherwiſe it is in this court.*

* *Douglaſs* and *Hall*, *Trin.* 19 *Geo.* 2. in K. B. Error of a judgment in aſſault and battery in *C. B.* and it was aſſigned for error, that the declaration is by way of recital: And upon argument by Mr. *Stracey* for the plaintiff in error, and by ſerjeant *Draper* for the defendant, the court held, that as this was in C. B. the declaration is made good by the recital of the writ; but that in treſpaſs in this court, ſuch a declaration would be ill: And *Lee* C. J. cited ſeveral caſes to this laſt point. (A)

1 Wils. 99. Barnes. 452. S. C. S. P. *Warren* v. *Lapdon*, Barnes 249. *White* v. *Shew*. 2 Wils. 203. on a ſpecial demurrer. (A)

See *Goodright* v. *Hodgſon*, poſt 282.

*P 22

*Michaelmas Term,

11 Geo. II. 1737.

Sir *William Lee*, Chief Juſtice.

Sir *Francis Page*,
Sir *Edmund Probyn*,
Sir *William Chapple*, } Juſtices.

Hudſon againſt *Smith*.

The Court will not compel a plaintiff in an action on a promiſſory note to enter up the judgment obtained by him; upon the application of a third perſon who has brought an action againſt him for uſury.

MOTION by Mr. *Marſh*, that the plaintiff's attorney may bring in and enter up a judgment obtained by the plaintiff, in an action on a promiſſory note againſt the defendant, in order to be evidence in an action brought by one *Eſſex* againſt the plaintiff, upon the ſtatute of uſury. And he argued, that all peoceedings are ſuppoſed, and ought to be, on the roll, for the inſpection of all perſons whatſoever, who have all a right to make uſe of it: And there is a rule of court, that attornies ſhall bring in their rolls. Though this be at the inſtance of a ſtranger, yet it is material that he is an informer in a popular action, ſo that the public is concerned. And whether the judgment is any proof of the uſury, is not the queſtion now, but is proper to be determined on the trial.

On

On the other ſide it was urged by ſolicitor general *Strange* and Sir *Thomas Abney*, that no perſon beſide the *defendant hath any right to inſiſt on the plaintiff's entring up judgment: And in this caſe even the defendant is not intitled to ſuch a demand, becauſe it appears that he conſented to pay the money for which the action was brought, and alſo the coſts, in order to ſave farther expence; and the note was thereupon delivered up; for which reaſon no judgment has been entered: And if it be now done, it muſt be at the plaintiff's expence. Neither will this judgment be any evidence at the trial. * P 23

For theſe reaſons the court denied the motion, and they ſaid, that here the application is to force the plaintiff to ſupport a proſecution againſt himſelf. And *Page* and *Probyn* juſt. ſaid, they never knew an inſtance of a roll being brought in at the inſtance of any perſon but one of the parties in the ſuit, or ſome of the officers of the court.

Note; When this matter was firſt moved, the greater part of the court ſeemed inclined to oblige the plaintiff to bring in the roll: And the C. J. then mentioned a caſe, where on an indictment of perjury the proſecutor moved, that the roll in the cauſe in which the perjury was committed might be brought in in order to prove the perjury. But this, as *Probyn* juſt. obſerved, was at the inſtance of the party concerned.

Gooſetree

Gooſetree againſt *Reynolds*.

The memorandum need not mention the ſpecies of action brought, as *de placito debiti*, &c. A general award to the ſheriff, without ſaying of what county, is good.

ERROR of a judgment in the Common Pleas: And it was aſſigned for error by Mr. *Burrel*, (1) That in the memorandum there is no cauſe of action mentioned, as *de placito debiti*, or the like; which is always mentioned in the books of entries, as in 1 *Brown.* 26, 27. *Robinſ.* 37. and others. (2) That the award to the ſheriff is general, without ſaying of what county; which is like the caſe, where it is omitted how a party appears, whether by * guardian or attorney. To which it was anſwered, and reſolved, (1) That as the memorandum recites, that a bill was exhibited, "the tenor whereof follows in theſe words," and then ſets out the bill, it is unneceſſary to mention the cauſe of action in the memorandum; though if it be mentioned, it is to be ſure well enough. (2) That the award to the ſheriff muſt be ſuppoſed to be to the ſheriff of the county where the action is laid; and it is always general:† And this is different from the caſe where it is omitted how the party appears, there being various manners of appearing. Wherefore the judgment was affirmed.

* P 24 S. P. *Adkin v. Worthington.* Barnes, 331. Prac. Reg. C. B. 35. Sr. Geo. Coke, 105.

† Except where the iſſue is drawn to a foreign county. *Lee* v. *Lacon.* Yelv. 69.

A *mandamus* does not lie to grant adminiſtration *cum teſtam' annex'* during minority, to a certain perſon; nor to grant it, generally.

MOTION by ſerjeant *Bootle*, for a *mandamus* to the commiſſary of *Richmond*, or his ſubſtitute, to grant adminiſtration *cum teſtamento annexo*, during the minority of the executor, who is an infant; to Mrs. *Barker*, the widow of the teſtator, and the executor's mother. But the court refuſed the *mandamus*, becauſe ſuch an adminiſtration is out of

of the ſtatute of *H.* 8. and the ſpiritual court hath in theſe caſes a diſcretionary power: And if the inferior judge doth not act rightly, the only way is by appeal.

Hereupon *Bootle* prayed a *mandamus* to grant adminiſtration generally. But C. J. ſaid, that no *mandamus* lies in this caſe. However, the court gave him leave to look into the books, and if he could find any precedents of a *mandamus* being granted in ſuch caſes, to mention them.†

† See *Smith's* caſe, 2 Stra. 892. poſt 366. 1 Barnard. 370. Fitz G. 163.

The King and *the churchwardens, &c. of Freſhford.*

MOTION by Sir *Thomas Abney*, for a *mandamus* to the churchwardens, *&c.* of *Freſhford*, to make an equal poor-rate on all the inhabitants of the ſaid pariſh, upon an affidavit by one of them, that her eſtate was *greatly over-rated, and that ſhe had applied to the ſeſſions, and they would not relieve her. Againſt which it was argued by Mr. *Gundry*, that a rate confirmed by the ſeſſions is now in being as appears by the party's own affidavit; and this court will not now examine into the regularity thereof, the determination of the ſeſſions being final: And an information was lately prayed againſt the ſeſſions for making an unequal rate, but refuſed, becauſe they are judges.

A *mandamus* does not lie, to make an *equal* poor-rate.

* P 25

And the court were unanimouſly againſt the motion, becauſe, as *Lee* C. J. ſaid, the party is not without remedy: For ſhe may bring an appeal, and if they will not receive it, they may be compelled by *mandamus* to proceed on it, when it is lodged. And if a *mandamus* was to go upon every unequal rate, it would be of very bad conſequence.†

† *Rex* v. *Guardians of the poor of Canterbury*, 4 Bur. 2290. S. P. Nor will a *Mandamus* lie to infert particular perſons in a Poor's-rate, *Rex* v. *Churchwardens of Wooly*. 2 Stra. 1259.

French

S.C. 2 Stra. 1081.

French qui tam againſt *Cockran.*

Stat. 21. *Jac.* 1. *c.* 4. requiring an affidavit, in penal actions, that the offence was committed in the county where, and within a year before, the action was brought, does not extend to actions given by ſubſequent ſtatutes.

MOTION to ſtay proceedings in an action on the 12 *A. c.* 16. (of uſury) becauſe no affidavit is here made, according to 21 *Jac.* 1. *c.* 4. *ſ.* 3. Againſt which it was argued laſt term by ſerjeant *Burnett*, and this term by Mr. *Barnardiſton*, that the 21 *Jac.* 1. doth not extend to ſubſequent penal laws; and ſo it was determined in *The King* and *Gaul*, *Salk.* 372. *Hicks*'s caſe, *Salk.* 373. and in *Harris qui tam* and *Renny*, (*a*) *Eaſt.* 7 *Geo.* 2. in *K. B.* Which laſt was an action againſt a butcher for ſelling live cattle, againſt the 15 *Car.* 2. *c.* 8. and upon a motion to ſtay proceedings, becauſe no affidavit had been made, that the cauſe of action aroſe in the county where the action was laid, according to the ſtatute of *Jac.* 1. it was determined, that this act does not extend to ſubſequent penal laws: And *Hardwicke* C. J. there ſaid, that he had ſeen a manuſcript report of *The King* and *Gaul*, (*b*) without the words [*pro tanto*] mentioned in *Salkeld.*

(*a*) 2. Barnard B. R. 413. 420. Cunn. 30.

(*b*) See S. C. 1 Ld. Raym. 373.

*It was replied by ſolicitor general *Strange* and others, that the act of *Jac.* 1. is a beneficial law, and made, as appears by the preamble, for the eaſe of the ſubject; and it ſeems to be the intention of the legiſlature, that it ſhould extend to ſubſequent laws; for which there is the ſame reaſon as that it ſhould relate to preceding acts. Indeed, where any ſubſequent ſtatutes are inconſiſtent with it, they are, and neceſſarily muſt be, repeals *pro tanto*; but this is not the preſent caſe, and therefore it differs from the caſes cited *contra*. For the 12 *A.* requires the action to

* P 26

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be brought in the ſame county where the offence is committed; and therefore an affidavit thereof is ſtill neceſſary: And ſo alſo is an affidavit neceſſary of an action being brought within the year; vexatious informations being always diſcouraged. Lord *Holt*'s opinion in *Hicks*'s caſe, *Salk.* 373. in point. As to *The King* and *Gaul* cited *contra*, the opinion of the judges, that the ſtatute of *Jac.* 1. does not extend to ſubſequent laws, was not neceſſary there, becauſe that caſe was founded on a preceding law; neither is it mentioned in the report of the ſame caſe in *Carth.* 465. The true diſtinction is, between thoſe ſtatutes which require the actions to be brought only in the courts of record, and thoſe which give a juriſdiction to the courts of ſeſſions *oyer* and *terminer*, *&c.* To the firſt of theſe the ſtatute of *Jac.* 1. doth not extend, as was the caſe cited of *Harris* and *Renny*, becauſe in this caſe there is an inconſiſtency between the acts; but there is none between the ſtatutes of *Jac.* 1. and 12 *A.* Beſides, uſury was an offence at common law.

But the whole court were of opinion, that the ſtatute of 21 *Jac.* 1. does not extend to ſubſequent laws, and conſequently that no affidavit is here neceſſary; nor was there ever any inſtance of any, in actions founded on the ſtatutes of uſury; and the caſes of *The King* and *Gaul*, and *Harris* and *Renny*, and the opinion of the ten judges in *Hicks*'s caſe, (which has always been adhered to, contrary to that of lord *Holt*) are in point. And *Chapple* juſt. * cited * P 27
Meſſenger qui tam and *Hobſon*, (*c*) *Mich.* 6 *Geo.* (*c*) ſt. 28. 292.
in *C. B.* where the ſame point was determined. And he ſaid, that it ſeems plain by the preamble of that act, that the legiſlature had only the laws then in being in view; and the words of the third

ſection

ſection are, "the ſaid penal ſtatutes:" and ſeveral laws are excepted out of the ſaid act.

The rule to ſhew cauſe, &c. was therefore diſcharged.‡

‡ In *White*, qui tam v. *Boot*, 2 Term Rep. B. R. 274. a rule was granted to ſtay proceedings in an action on 25 *Ed.* 3. *ſt.* 4. *c.* 3. for want of ſuch an affidavit. But in *Leigh*, qui tam, v. *Kent*. 3 Term Rep. B. R. 362. on the Stat. 21 *Hen.* 8. *c.* 13. for non-reſidence; where the objection was made after verdict, and over-ruled; the Court queſtioned that determination, holding that the ſtatute was merely directory to the officer, and does not control any of thoſe ſtatutes on which penal actions are to be brought in the ſuperior courts.

S. C. 2 Stra. 1103. poſt. 174. 291.

Garland qui tam againſt *Barton.*

Certiorari granted to remove an information before juſtices of aſſize, againſt a parſon for non-reſidence. The defendant to obtain that writ muſt ſhew a ſpecial reaſon; otherwiſe if the Crown, or proſecutor apply for it. The want of juriſdiction is a ſufficient reaſon for granting it.

A *Certiorari* was prayed laſt term by Mr. *Worley Birch*, to remove an information before the juſtices of aſſize, againſt a parſon for non-reſidence, on the ſtatute of 21 *H.* 8. *c.* 13. *ſ.* 26. (1) Becauſe (as he urged) the juſtices of aſſize have no power to hold plea in this matter, the act extending only to the courts of *Weſtminſter-hall*; for in no other can wager of law, eſſoin or protection, be allowed.—*Cro. Car.* 112, 146. (2) Becauſe the clerk of aſſize hath no power to file an information *ex officio*, by the ſtatute of 4, 5 *W.* 3. *c.* 18. And it is no objection that theſe are matters of law, and may be taken advantage of below at the aſſizes; for it will then be in the nature of a plea to the juriſdiction, which is a plea not to be favoured: Whereas if the information be removed, the caſe will ſtand in a different light; as it will then tend towards enlarging the juriſdiction of this court, excluſive of inferior courts.

A rule to ſhew cauſe was thereupon granted; and after hearing counſel againſt it, and taking the caſe into conſideration, it was laid down by *Lee* C. J. (who

(who now delivered the opinion of the court) (1) That a *certiorari* ought not to be granted, at the inſtance of a defendant, to the judges of aſſize, without ſome ſpecial reaſon for it; but otherwiſe it is at the prayer of the crown or *proſecutor. *Salk.* 144, 150, 151. *King* and *Ellford*, *Mich.* 4 *Geo.* 2. a *certiorari* was there refuſed, to remove an indictment found at the aſſizes for forgery, at the inſtance of the defendant, for want of a ſpecial cauſe. * P 28 (2) That it is a good reaſon for granting the preſent *certiorari*, that the judges of aſſize have no juriſdiction in the cauſe; and ſo it has been often determined. *Gregory*'s caſe, 6 *Co.* 19. *b.* *W. Jones* 173. *Cro. Car.* 112. 146. 2 *Hale's Hiſt. P. C.* 30. And C. J. alſo cited *Meſſenger* and *Hobſon*, (*a*) *Mich.* 6 *Geo.* 2. in *C. B.* and he ſaid, that in *Farthing qui tam* and *Martyr*, (*b*) *Mich.* 13 *Geo.* 1. [which was cited at the bar as a caſe in point, that an action of debt does not lie in this court on the ſtatute of non-reſidence] no judgment was ever given. A *certiorari* was therefore awarded. †

(1) S.P. *Rex* v. *Lewis.* 4. Bur. 2456. *Rex* v. *Eaton* 2 Term. Rep. B. R. 89. *Rex.* v. *Whitbread*, Doug. 534. *Zink.* v. *Langton* Doug. 721.

(2) *Rex* v. *Whitbread.* Doug. 534. & ibid. n. 113.

(*a*) ante 27. poſt. 292.

(*b*) poſt. 292.

† As to the point of the Juſtices of Aſſize not having juriſdiction in this caſe, ſee *Leigh*, qui tam. v. *Kent.* 3. Term. Rep. B. R. 362. nor of the offence of taking lands to farm, contrary to ſect. 1. of the ſame act, ſee *Rex* v. *Wright.* 1 Bur. 543.

Booth againſt *Garnett.*

S.C. 2 Stra. 1082.

DEBT upon bond: The defendant craves *oyer* of the condition, *quod conceditur*; and it was in effect, that whereas the plaintiff and one *Gilbert* The condition of a bond being, to pay the plaintiff ſo much money as the arbitrators, under a ſubmiſſion entered into between the plaintiff and A. ſhould award A. to pay to the plaintiff. An award that A. ſhould give a *promiſſory note* to the plaintiff, payable at a future day, is within the condition.

had become bound unto each other for performance of the award of, *&c.* if the defendant ſhall pay ſo much money to the plaintiff as the ſaid *Gilbert* ſhall be awarded to pay unto him, ſo as the ſame ſhall not exceed 20*l.* the obligation ſhall be void: And the defendant pleads, that the arbitrators did not award that *Garnett* (the defendant) ſhall pay any money to the plaintiff. Plaintiff replies, that the arbitrators awarded, that *Gilbert* ſhould give a promiſſory note to the plaintiff, payable to him or order for 18*l.* at a future day, for value received, to be accepted by the plaintiff in full of all demands, and that a receipt ſhould be given by him accordingly; and the plaintiff further pleads, that the ſaid *Gilbert* did give ſuch a note, and that he hath never paid the money thereon due. To this the defendant demurs.

* P 29 *It was argued in *Eaſter* term laſt by ſerjeant *Agar* for the defendant, and by ſerjeant *Chapple* (now one of the judges of this court) for the plaintiff; and this term, by Sir *Thomas Abney* for the defendant, and ſolicitor general *Strange* for the plaintiff.

And it was argued for the defendant, that what is here awarded is not comprized within the letter of this bond; the words whereof are to be conſtrued ſtrictly, eſpecially as the defendant is a ſtranger to the contract between the plaintiff and *Gilbert*, and is to receive no benefit by the award. Now in common parlance, according to which awards, being made by lay-gents, muſt be underſtood, no money is here awarded to be paid: For though a note is to ſome purpoſes conſidered as money, yet it is not really money, nor is it ſo ſafe as money; and though it be good payment between the parties, yet it doth not bind a ſtranger, nor as to him is it to be regarded as ſuch. Suppoſe the plaintiff had brought an action againſt *Gilbert* upon the ſubmiſſion bond, the plaintiff

plaintiff could not aſſign for breach, that *Gilbert* had not paid the money; for as *Gilbert* hath complied with the award by giving his note, the plaintiff could only take advantage thereof. *O. Benl.* 15. S. C. *Moor* 3. *pl.* 8. If this action is maintainable, the plaintiff will have a double ſatisfaction, *ſc.* by ſuing alſo upon the note, which may be indorſed over, and put in ſuit many years hereafter.

Beſides, all arbitrators have a limited authority, which they muſt not exceed, not even in a part merely formal: And therefore where an award is to be under hand and ſeal, and one of theſe requiſites is wanting, the award is ill; and ſo it is determined in *Roll's Abr.* and alſo in *Anderſon* and *Williamſon*, (a) *Mich.* 5 *Geo.* 1. Now here they have exceeded their authority, by awarding a note to be given, which is not within the ſubmiſſion: And therefore the award is ill as to the party himſelf, 1 *Roll.* 243. and conſequently it is ſo as to the defendant, who is a ſtranger.

(a) Stra. 116.

*It was alſo objected to the replication, that it only mentions that *Gilbert* has not paid the money; whereas it ought to have been alſo averred, that no one elſe has paid it. *P 30

On the other ſide it was argued, that as all awards tend to compoſe ſtrife, they ought to be conſtrued according to the intention of the parties: And what is here awarded is plainly within the meaning of the defendant's bond, as it is in effect an awarding *Gilbert* to pay to the plaintiff ſo much money. That this is ſo at this day plainly appears by the ſtatute of 3, 4 *A. c.* 9. which enacts, That all promiſſory notes, *&c.* ſhall be due and payable; and alſo that they ſhall be conſtrued to be a full payment. The note here too is to be made payable to the plaintiff or order, ſo that he may indorſe it over, and receive the

money whenever he pleaſes: And it is further awarded to be in full of all demands. Suppoſe it had been awarded, that ſo much money ſhall be paid on a future day; though theſe are not the words of the condition of the defendant's bond, yet certainly it would have been within the condition, as the giving a future time would be only for the eaſe and benefit of *Gilbert*: And this is the preſent caſe, with this addition, that a ſecurity is to be given, which makes no difference; for a releaſe of all debts is a releaſe of all ſecurities. *Objected*, That in an action brought on the award, it cannot be aſſigned for breach that *Gilbert* has not paid the money. *Anſwer*, If a breach can be aſſigned in any part of the award within the meaning of it, it is ſufficient. And as to the objection, that the party will have two different remedies; this is not material, becauſe he can have but one ſatisfaction.

Objected to the replication, that it ſhould have been averred, that the money has not been paid by *Gilbert*, or any other perſon. *Anſwer*, If it has been paid by any one elſe, this is a matter proper to be ſhewn on the other ſide.

* P 31 *It was alſo objected by the plaintiff's counſel to the plea, that the condition of the defendant's bond is, that he ſhall pay what the arbitrator's ſhall award *Gilbert* to pay; and the plea is, that the arbitrators made no award that *Garnett* ſhall pay any money, whereas *Garnett* is a ſtranger to the ſubmiſſion. But as to this point, *Lee* C. J. ſaid, that though the plea be faulty, yet if it appears on the record that this action is not maintainable, the demurrer is right, and the defendant muſt have judgment.

And the whole court were clearly of opinion, that the matter here awarded is within the condition of the defendant's bond, the intent thereof being that the defendant ſhould pay ſuch money as *Gilbert* ſhould be

be awarded to pay, or, which is the ſame thing, to ſecure the payment of: And here 18*l.* is awarded to be paid, and a ſecurity to be given for it; which is alſo plainly within the ſubmiſſion. Judgment therefore for the plaintiff.

Weſt againſt *Morris.*

THIS being a cauſe in the paper, and having been once argued, it was then ordered to ſtand over on an *ulterius concilium*; and the ſame counſel who argued the caſe before, now appeared to re-argue it; ſerjeant *Chapple* having been made one of the judges of this court ſince the former argument.

Where a cauſe ſtands over on an *ulterius concilium*, and a new judge comes into court; it muſt be argued by new counſel. Otherwiſe where it ſtands over for the opinion of the Court. poſt. 33.

But the court refuſed to hear the caſe argued; and they laid down this for a rule, that where a caſe ſtands over upon an *ulterius concilium*, and a new judge comes into court, it muſt be argued by new counſel; but if it ſtood over for the opinion of the court, and it is argued again only for the information of the new judge, it may be argued by ſome of the former counſel. And *Lee* C. J. ſaid, that lord *Parker* ſtrictly adhered to this rule.

Burton

church and the church-yard belonging thereto; whereupon a rate was made by the parishioners for reimbursing the same unto the defendants; and the said three vills were rated at above one third. And the plaintiff alledges, that he is an inhabitant of ——— (one of the three vills) and did not occupy lands in *Athelstone*, and that he was rated 6*l.* for which he is libelled against by the defendants. The defendants plead, protesting that the lands rateable in the three vills exceed in value the lands in *Athelstone*, that being churchwardens for *the year 1733. they had laid out 19*l.* in repairing the said church and church-yard, and after passing their accounts, a rate was made on the parishioners in *A.* amounting to—— and a rate on the three other vills amounting to—— and the plaintiff was rated 6*s.* To this plea the plaintiff demurs. * P 33

It was first argued last *Michaelmas* term by serjeant *Bootle* for the plaintiff, and by Mr. *Denison* for the defendants; and in *Hilary* term last by Mr. *Noell* for the plaintiff, and by serjeant *Eyre* for the defendants: And it was this term re-argued (serjeant *Chapple* having been made one of the judges of this court since the last argument, and the case then standing over on a *cur' adv' vult*) by serjeant *Bootle* and Mr. *Denison*, as before. Ante 31

On the part of the plaintiff it was insisted, that this is a bad plea, for it admits the custom set out in the declaration, and the churchwardens have no authority to levy money contrary to it. Whether the lands in the three vills are more valuable than those in *A.* as mentioned in the plea, or not, is quite immaterial.

It was answered by the counsel for the defendants, that the plea sets out a fact, the contrary of which should have been alledged, as the reason of the custom,

tom, that the defendants might have traverſed it. And they objected to the cuſtom, (1) That the inhabitants of the pariſh only are thereby chargeable with the reparation of the church, whereas none are rateable hereto but the occupiers of lands: For though it be a charge on the perſon, yet it is in reſpect of the land. *Jeffrey's* caſe, 5 *Co.* 66. *b.* 2 *Roll.* 289. *pl.* 4. *Comb.* 132. As to the conſtruction of the word [inhabitant], it cannot poſſibly include both inhabitants and occupiers, becauſe if they are both chargeable, it is in different reſpects. And though an outdweller, who owns and uſes lands in a pariſh, is liable to church-rates, this is not as an inhabitant, but as an occupier. Indeed by conſtruction of law, ſuch an one is an inhabitant of *the pariſh; but here the word is to be taken according to its common acceptation: And by other parts of the declaration it appears that the plaintiff uſes it accordingly: For in the beginning of the declaration he ſets out, that "the "inhabitants of *A.* are more numerous than the in- "habitants of the three other vills;" by which he muſt mean perſons living in *A.* and the other vills; and the declaration muſt therefore receive the ſame conſtruction in the ſubſequent parts of it. The word [pariſhioner] is alſo uſed where the plaintiff ſpeaks of the meeting and making a rate; and it ſeems to be put in contradiſtinction to the word [inhabitant]. And the averment, that the plaintiff "is an inha- "bitant of ——— and did not occupy any lands in "*A.*" ſtrongly implies a diſtinction between an inhabitant and occupier. That in legal proceedings, the word [inhabitant] means only perſons reſiding in a pariſh, appears by 2 *Inſt.* 703. So it does when uſed in ſetting out a cuſtom. 6 *Co.* 59. *b.* And though in ſome ſtatutes the word has been conſtrued to ſignify occupiers; as the ſtatute of hue and cry, and the ſtatute of *H.* 8. relating to bridges, (which

* P 34

2. Inſt. 733.

lord

lord *Coke* in his commentary thereon ſays, is by reaſon of the neceſſity of the thing) there is a great difference between conſtruing acts of parliament and legal proceedings. The firſt muſt be conſtrued according to the intent of the legiſlature, and in ſuch manner, that all the parts of the ſtatute may ſtand together; but in pleading, the words muſt be taken in a ſtrict legal ſenſe, though they be ever ſo inconſiſtent. Therefore in an avowry, upon a diſtreſs taken for not repairing of bridges, if the word [inhabitant] was uſed, it would ſcarce be good, though that be the word mentioned in the ſtatute. And in the late caſe, (*a*) a declaration againſt the defendant "as in "the cuſtody of the marſhal of the King's Bench," was held ill; though thoſe are the words generally uſed in acts of parliament. As this cuſtom therefore charges the inhabitants only, excluſive of occupiers, (who, by common right, are chargeable to the reparation of churches) it is unreaſonable and void; eſpecially as it tends to the prejudice of the church. *Hob.* 329. *Hetl.* 130. 2 *Roll.* *Rep. 463. *Latch* 203. P * 35

(*a*) *Biſhop* v. *Stracy* or *Stacey*. 2 Kely. 121. 2 Barnard. 298. 2 Stra. 954.

(2) This cuſtom is ill, in charging *A.* with two thirds, and the other three vills with one third only, without any ſufficient reaſon being given for this inequality; which ought to have been ſhewn, and made part of the cuſtom, that the defendants might have traverſed it. 2 *Roll.* 290. *Poph.* 197, 2 *Leu.* 186. It would be a good reaſon if the lands in *A.* were more valuable, in proportion to the rate with which it is charged, than the lands in the three other vills; for church-rates ought to be proportioned according to the quantity and quality of the land: But the reaſon here given for this inequality is, that *A.* is more populous than the other vills, which is not material: And an inſufficient reaſon is all one as no reaſon at all. Beſides, the reaſon of this cuſtom ought to have

have been ſhewn to be a ſubſiſting one, as is done in the before cited caſes. For a cuſtom, which in the beginning was good and reaſonable, may in tract of time become unreaſonable; and if the cauſe or conſideration thereof ceaſes, the cuſtom is aboliſhed. But indeed in the preſent caſe, the very ſuppoſition that the cuſtom might have had a reaſonable commencement, is taken away by the plea; as this ſhews that the lands in the three vills have always been more valuable than thoſe in *Athelſtone*. As therefore no good and ſubſiſting reaſon of this cuſtom is here diſcloſed, it ought not to be allowed; eſpecially as it is a cuſtom of a public nature, and againſt common right. (3) The cuſtom, as it is here ſet out, not only exempts ſome perſons who are ſubject to church-rates, but it includes others who are not liable; as femes covert, infants, ſervants, *&c.* who are all comprehended in the word *inhabitant*; but having no property, are not rateable to the reparation of the church. In a preſcription for an eaſement, as for a way to a church or market, the above perſons are always included in that word; though it be otherwiſe in a preſcription for a profit. (4) In the record a cuſtomary election of churchwardens is ſet out; but it doth not appear whether they are choſen by the parſon or the pariſhioners, or who are the voters; and therefore the cuſtom is uncertain. (5) The cuſ-
* P 36 tom is *inconſiſtent: For the plaintiff in the firſt place ſets out, that there are three churchwardens annually choſen for the pariſh of *Mancheſter*; and afterwards, that two of them are inhabitants of *A.* and diſtinct officers for *A.* and that the other is an inhabitant of the other vills, and a diſtinct officer for them: So that, according to this, there three churchwardens for the whole pariſh, and two of are them are churchwardens for part only, and the other for another part. (6) It is againſt law that two of the church-

churchwardens ſhould be diſtinct from the third, becauſe all the churchwardens of a pariſh make but one corporation. *Cro, Jac.* 234.

On the other ſide it was argued, that there is a great difference between ſetting up a right in defence of the juriſdiction of the temporal courts, and where it is done in the caſe of property. In the former caſe, a greater latitude is allowed than in the other. *Yelv.* 55. A cuſtom alledged in ſupport of a prohibition is alſo in nature of an iſſue directed by the court for the information thereof, and therefore it ought to receive a favourable conſtruction. But more particularly, (1) The word [inhabitant] is not to be taken in ſo reſtrained a ſenſe as to exclude occupiers: For an occupier of lands, though living out of the pariſh, is an inhabitant, as to the purpoſe of paying church-rates, and chargeable as an inhabitant within the pariſh. *Jeffrey*'s caſe, 5 *Co.* 67. *b.* In ſeveral acts of parliament where [inhabitants], or other words equivalent, are the only operative words, the occupiers of lands within a pariſh, though living out of it, are included: As in the ſtatute of 22 *H.* 8. *c.* 5. for repairing of bridges, (2 *Inſt.* 703.) in the ſtatute of 28 E. 3. *c.* 11. of hue and cry, (2 Saund, 423.) and in the ſtatute of 13, 14 *Car.* 2. *c.* 12. for relief of the poor. So is the conſtruction of the word at the common law. 5 *Co.* 67. *b.* By the common law, occupiers of lands are liable to repair the roads though they live in another pariſh, (1 *Roll.* 390. 2 *Roll. Rep.* 412.) and yet in indictments for not repairing of highways, the word [inhabitant] is uſed: And in the *ſame caſe a *diſtringas* lies againſt the inhabitants. 1 *Mod.* 194. And ſo the word is underſtood in other caſes. *Chamberlayne of London's caſe*, 5 *Co.* 63. *Hob.* 212. *Cro. El.* 569. S. C. *Moor* 355. By theſe caſes, and particularly the laſt, it appears that the word [inhabitant] as well in pleading as in acts of parliament, ought to be conſtrued according to the ſubject matter.

* P 37

ter. And therefore if an occupier of lands is chargeable as an inhabitant as to the payment of church-rates, the word ought, in conſtruction, to include an occupier, where this is the ſubject matter. The objection, that [inhabitants] and [pariſhioners] are here uſed in oppoſition to each other, is of no force, becauſe where mention, is made, in the pleading, of the pariſh, the word [pariſhioners] is uſed; and where vills are mentioned the word [inhabitants], as being, in propriety of ſpeech, more applicable to their reſpective ſubjects. And it is plain by the plaintiff's ſaying, that "he is an inhabitant in ——— (one of the three "vills) and doth not occupy lands in *A.*" that he did not intend to exclude occupiers by the word [inhabitants]. (2) This cuſtom is good notwithſtanding the inequality of the rate; as every cuſtom implies a conſent of the perſons concerned for their mutual convenience. Indeed where an exemption is ſet up, in caſes where the public good is in queſtion, ſome reaſon for it ought to appear: But in this caſe no damage can accrue to the public, the only matter in diſpute being, in what proportion the vills muſt pay the church-rates; for the whole aſſeſſment muſt be paid. Suppoſe therefore that no reaſon can now be given for the beginning of this cuſtom, which through length of time may probably be forgotten, yet the cuſtom itſelf, having been ſo long received, and commencing (as it muſt be preſumed) by the conſent of the pariſhioners, and alſo tending to the peace of the parties concerned, it is not now to be overturned. So the cuſtoms of gavelkind and of *burrough-engliſh*, which, amongſt other things, impower infants to make feoffments, are allowed by law; though no particular reaſon now appears for theſe cuſtoms: And many other cuſtoms, particularly thoſe mentioned in *Kitch.* 202. are contrary to the common law, and yet good; though it be very difficult to aſſign the reaſons

* P 38

ſons of them. As to ſhewing the reaſon of the cuſtom in pleading, this being a matter *dehors*, need not be done; but the court is to judge of the cuſtom as it is ſet out. 1 *Salk.* 197. No caſe has been cited to prove that the reaſon of a cuſtom is traverſable; but 2 *Roll.* 290. ſhews the contrary. In the preſent caſe, it is to be ſuppoſed there was originally a good reaſon of the inequality. And indeed this partly appears by the declaration; wherein it is ſhewn, that there are two churchwardens for *A.* and but one for the three other vills, (which proves that there is a greater collection for *A.* than for the other vills) and alſo that *A.* is more numerous in inhabitants than the other vills; in conſequence whereof *A.* hath more ſeats in the church in proportion thereto: And as each inhabitant receives there a perſonal ſervice, (which is the foundation of the rate) it is reaſonable that he ſhould pay ſomething in conſideration thereof. Beſides, it is here ſtated, that *A.* from time out of mind hath always paid two thirds, and the other vills one third; and this is a conſideration or reaſon ſtill ſubſiſting. 2 *Roll.* 290. *pl.* 2. *March* 91. It cannot be objected, that the cuſtom is uncertain as to the rate; for if it be reducible to a certainty, it is ſufficient: And when the rate is aſſeſſed, the ſum is aſcertained. (3) The objection, that this cuſtom includes femes covert, ſervants, *&c.* is not material; for theſe exceptions are never ſet out in pleading, unleſs it be by the party who takes advantage of them. 1 *Sid.* 18. (4) As to the election of the churchwardens, this is no part of the cuſtom, but only introductory to it. Beſides, it muſt be taken as the words of this pleading are, that they are choſen by the pariſhioners. But this circumſtance is quite immaterial in the preſent caſe, it being here ſufficient, that the defendants have in fact been choſen churchwardens.

wardens. (5) There is no inconſiſtency in the cuſtom or pleading: For firſt three perſons are choſen churchwardens for the entire pariſh, and then there is a diſtribution of them as to the exerciſe of their
* P 39 office; which is often the *caſe. (6) Though the churchwardens of a pariſh make but one corporation, yet cuſtom may over-rule this, and controul it.

The court were clearly of opinion, that this cuſtom is well alledged, and alſo a reaſonable one; for (1) The word [inhabitant] is to be conſtrued according to the ſubject matter, and therefore here includes all ſuch perſons as are liable by law to the payment of church-rates: And theſe are all ſuch as have any perſonal or real eſtate in the pariſh. The firſt and third objections therefore will not hold. And *Probyn* juſt. alſo ſaid, in anſwer to the third objection, that there was no need for excluding femes covert, and other perſons who are not liable, becauſe when theſe are charged, it is proper for them to ſhew their exemption. (2) As to the cuſtom itſelf, it may be a very reaſonable one; for *Athelſtone* perhaps hath richer inhabitants than the other vills: And an inhabitant is to be charged according to his ability in land or living. *Godolph. Rep. Appendix* 10, 11. The plaintiff's averment muſt indeed be conſidered as mentioned by him for the purpoſe of ſhewing the reaſonableneſs of the cuſtom: But though this be not ſufficient for that end, yet as the cuſtom does not appear unreaſonable on the face of it, (by which the court muſt go) it is not to be overturned on a demurrer. 1 *Vent.* 167. S. C. 1 *Mod.* 77. All cuſtoms muſt be ſuppoſed to have had a good commencement, unleſs they appear to be inconſiſtent, or againſt reaſon. And *Page* juſt. ſaid, that if a cuſtom is good in the beginning, though the reaſon or cauſe thereof be afterwards altered, it ſtill remains good, as it implies an agreement at firſt, how, at all events, it ſhould be.

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The whole court, without taking notice of any other of the objections, concurred in giving judgment for the plaintiff.

Hornby againg *Houlditch, executrix of Houlditch.*

S C. 1 Term Rep. B. R. 93.

* P 40

COVENANT for rent due on an indenture of leaſe made to *Richard Houlditch*, Eſq; the defendant's teſtator, for years. Defendant pleads the ſtatute of 7 *Geo.* 1. *c.* 28. and that her ſaid teſtator was one of the directors of the *ſouth-ſea* company, and therein named, and is thereby acquitted and diſcharged of and from the payment of all rent due on the ſaid leaſe; whereupon the plaintiff demurs.

In covenant for rent, againſt executrix of leſſee, who was one of the directors of the *South Sea* Company, held that 7 *Geo.* 1. c. 28 which veſted their eſtates in truſtees, did not diſcharge him from the expreſs covenant.

It was firſt argued laſt *Michaelmas* term, by ſerjeant *Wright* for the plaintiff, and by ſerjeant *Eyre* for the defendant; and this term it was again argued by ſerjeant *Skynner* for the plaintiff, and by ſerjeant *Hawkins* for the defendant.

On the part of the plaintiff it was argued, that after an aſſignment of a leaſe, the leſſee is ſtill liable to be ſued upon his own expreſs covenant: And though it may be objected, that the premiſſes are here transferred by an act of parliament, to which all the parties to the leaſe are privy, yet this ſtatute is to be conſidered in the nature of a judgment, and as the act of the leſſee himſelf; his "notorious, indirect "and fraudulent practices," being the ground thereof; as appears by the ſtatute itſelf. Now the law conſtrues every thing according to the cauſe thereof; and where a thing is cauſed by a perſon's own wrong, as is the preſent caſe, it ſhall not

not be taken advantage of by the delinquent himſelf. 1 *Vent.* 175. S. C. 2 *Keb.* 831. S. C. 2 *Lev.* 26. The leſſor is alſo an innocent perſon, and the ſtatute ought not to be conſtrued to the prejudice of ſuch an one. *Co. Lit.* 260. *a.* If the act be conſidered as intended to give ſatisfaction to the perſons wronged, it cannot reaſonably be ſuppoſed, that at the ſame time it was intended thereby to do a wrong to others.

* P 41 *And if it be conſidered as a puniſhment, it could not intend to enable the offender to take advantage of his own wrong. Beſides, there are no words in the ſtatute which diſcharge the perſon of the leſſee; neither does it work a total diſability in him to pay the rent, there being 5000*l.* allowed to him; though if it was, yet as the act was occaſioned by his own crimes, he ought not to take advantage thereof. So in the caſe of attainders, an action lies againſt the perſon attainted, though he forfeits all his lands and goods. *Noy* 1. *Cro. Eliz.* 516. *Owen* 69. *Moor* 178. Neither is this act a good diſcharge of the offender's debts, for it appears by *ſect.* 28. that their debts are to be paid by themſelves. This caſe ſeems therefore ſimilar to that of bankrupts, who, before there were words inſerted in the acts relating to them for diſcharging the perſon, were ſtill liable to the payment of their debts, though they were ſtrip'd of all their eſtate. And ſerjeant *Wright* cited the caſe of *Houlditch* (the preſent teſtator) and *Miſt*, (*a*) *March* 1721. Where a like queſtion came before lord chancellor *Macclesfield*, and he was of opinion, that this ſtatute is not to be looked on as a ſatisfaction; and that the parties ought notwithſtanding to pay their debts. It was further urged, that ſuppoſing *Richard* the teſtator was not liable at the time of the act, yet his executrix is liable, as ſhe hath aſſets: And if ſhe be not liable, ſhe ſhould have pleaded *plene adminiſtravit.*

(*a*) 1 P. Wms. 695.

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On the other ſide it was argued, that by the intent of this act, (which is the beſt expoſitor thereof, according to 11 *Co.* 73. *b.*) the defendant's teſtator is not liable to the payment of his debts; for thereby all the eſtates, both real and perſonal, of the directors, are taken from them, ſo that it wholly diſables them from performing their contracts and covenants: And therefore if their perſons ſhould be ſtill liable, they muſt of neceſſity go to priſon, which is a puniſhment not intended by the act. As to the money allowed to the directors, this appears to be for the neceſſary ſubſiſtence of themſelves and their family, which cannot be applied to that purpoſe, if they are ſubject to *their contracts. And it is obſervable, * P 42
that a power is given to the truſtees to compound for debts owing to the directors, and to act in all reſpects as intire proprietors of their eſtates. There is alſo a proviſion made for all contingent demands; and if the directors ſhould be perſonally liable, the ſtatute would be an eaſe to them, becauſe it directs, that if the claims are not made by ſuch a time, they ſhall be void. (*Sect.* 21.) Beſides, this is a general act, and conſequently all the creditors are parties and privies thereto. Now ſuppoſe a leſſor turns his leſſee out of the premiſſes demiſed, he cannot bring an action of covenant againſt him: And that is the caſe here; for by the ſtatute, to which the leſſor has conſented, he hath (in effect) expelled the leſſee, and choſen other perſons in his room. It is indeed ſaid in 1 *Vent.* 176. that the words of an act of parliament are the words of every man, but not ſo as to give up their intereſt; but there is no reaſon for this diſtinction: For if a man's intereſt is not bound by ſtatutes, there is no need of any ſavings in them; which are uſually inſerted, but omitted here. This caſe therefore is different from a leſſee's aſſignment of his leaſe;

for there it is his own voluntary act, but here it is not so; and the privity of contract is wholly destroyed. And it has been determined, that if a person covenants to do a lawful act, and a subsequent statute makes it unlawful, he cannot be sued on the covenant. 1 *Salk.* 198. *Dr. Bettisworth* and *the dean and chapter of St. Paul's* 1728. (*b*) in the house of lords, there the dean and chapter had contracted to make leases, which afterwards, by act of parliament, they were restrained from doing; and it was held, that they were not liable to actions upon those contracts, by reason of the act. In the present case no prejudice accrues to the lessor by this construction of the statute, for he has the same right to the premisses which he had before, and his remedy for the rent is only transferred from his lessee to the trustees, against whom he may bring an action of debt; or else he may distrain for the rent. It is also material, that there is a covenant in the lease from the lessor, for the lessee's quiet enjoyment, in *consideration of which it is, that the lessee covenants to pay the rent. Now it is plain that the testator could not bring an action on that covenant against the lessor, and therefore the lessor ought not to be intitled to an action against the lessee: For though mutual covenants cannot be pleaded in bar to one another, this is only in cases where they are distinct. 3 *Lev.* 42. As to the cases mentioned of attainted persons, there the estate is vested absolutely in the crown, but here it is transferred to trustees for the sake of creditors; and there the creditor hath no other person to resort to but the offender, whereas here he may proceed by way of action against the trustees, or of distress. And in the case of bankrupts, to which this is compared, there is seldom any surplus; whereas here, as the act mentions, there is more than sufficient to pay the creditors; and in that case, if there be any, it belongs to the

(*b*) Select Cas. in Cha. 66. 2 Eq. ab. 26. c. 30. 3 Bro. P. C. 389.

*P 43

the bankrupt. Neither is there any clauſe in the old bankrupt acts, that the claims ſhall be void, unleſs they are made out under the commiſſion; and in the preſent caſe there was no need of any words of diſcharge in the ſtatute, becauſe care is taken therein of creditors. Beſides the foundation of ſuing bankrupts is the proviſo of 13 *Eliz. cap.* 7. *ſect.* 10. which impowers creditors, not receiving full ſatisfaction, to ſue the bankrupt for the reſidue. And (laſtly), the caſe of *Miſt & al'* againſt *Houlditch* (the defendant's teſtator) was cited; where a judgment was obtained by ſurprize againſt defendant for a debt contracted in the year 1720. and he brought a writ of error thereon, and alſo a bill in equity, againſt the plaintiffs and the *ſouth-ſea* company; and an order was made by the lord chancellor, that the truſtees named in the act ſhould pay the money recovered againſt *Houlditch.* Ante. 41.

It was replied, (amongſt other things) that the debts provided for by the act are ſuch as ſhould be due 5 *January*, at which time nothing was payable for rent, and conſequently nothing could be then claimed: And a releaſe of all demands does not diſcharge a covenant before *it be broken. *Co. Lit.* 292. *b.* Beſides, the creditors are called in, not for their own ſakes, but in order to diſincumber the eſtate, and to make the title clear to purchaſers. If they ſhould chooſe to follow the eſtate, then indeed they are required to make their claims within ſuch a time; but no proviſion is made if they ſhould elect to follow the perſon. And though the creditors are parties to the act, they are not ſo far parties as to give up any intereſt by it. * P 44

And the court were unanimouſly of opinion, that this act cannot be conſidered as a diſcharge or acquittal of *H.* the original leſſee, from his expreſs covenant, there being no expreſs words contained therein for this purpoſe; without which it would be very hard (as the ſtatute was occaſioned by the leſſee's own act) to deprive the leſſor of his election of ſuing either the aſſignee or leſſee, which by law he is clearly intitled to. *Cro. Jac.* 309. 1 *Saund.* 240. The ſtatute amounts only (they ſaid) to an aſſignment of the leaſe; and though it be a public one, and conſequently the leſſor muſt be taken as conſenting thereto, yet beyond this his aſſent cannot be extended. And the court ſaid, that the caſe of bankrupts is very ſimilar to the preſent; for if there were no words of diſcharge inſerted in the ſtatutes relating to them, they would remain ſtill liable to their debts notwithſtanding the commiſſion.† Judgment for the plaintiff.

Note; Upon the former argument of this caſe, lord *Hardwicke* (who was then chief juſtice of this court) delivered alſo his thoughts (but without giving an opinion) in favour of the plaintiff.

† Upon the point in this caſe, with reſpect to Bankrupts, ſee *Meyer* v. *Steward.* 4 Bur. 2439.—*Cantrel* v. *Graham* Barnes 69.—*Wadham* v. *Marlow.* Cooke's Bankr. law. 346. *Ludford* v. *Barber.* 1 Term Rep. B. R. 66.—*Milk* v. *Auriol.* H. Blacſt. Rep. C. B. 433. 4 Term Rep. B. R. 94.

Kempfield

Kempfield againſt *Moore.*

ACTION on the caſe. Defendant pleads in abatement, that by antient prerogative and cuſtom the barons of his Majeſty's court of Exchequer, and the fitting * clerks, and all other officers attending there, are intitled to privilege, *&c.* as long as it is open; and then ſhews, that he is a ſide or ſitting clerk to *John Tomſon*, remembrancer of the Exchequer in the diviſion of the lord *Maſham*, *&c.* and pleads to the juriſdiction. The plaintiff replies, that there is no record of defendant's being ſuch an officer; and the defendant demurs.

In B.R. defendant pleads privilege for the fitting-clerks of the *Exchequer*; and ſtates that he is a ſide or ſitting clerk to the remembrancer. Plaintiff replies that there is no record of the defendant's being ſuch officer; upon demurrer thereto, a *Reſpondeat Ouſter* is awarded.

It was objected, on the part of the defendant, by Mr. *Deniſon*, that the replication ſhould have been, that defendant was not a ſide clerk, in order to have this matter tried by the country; for a ſide clerk is no officer inrolled or ſworn, but only a ſervant to a clerk who is inrolled; all one as the clerks of prothonotaries, and the clerks of the court of chancery, except the ſix clerks; and therefore it cannot be tried by record. *Raſt. Ent.* 473. *Hardr.* 164. *Carth.* 362.

* P 45

It was anſwered by ſerjeant *Draper*, that all the officers of the Exchequer, who are intitled to privilege, are ſuch only whoſe names are in the black book; which is the record of that court; and therefore the replication is good. And he objected to the plea, (1) That it includes all officers of other courts occaſionally attending at the Exchequer: For the plea is, "That the barons, *&c.* ſitting clerks, and all

all other officers attending there, are intitled, *&c.* (2) It is not ſhewn that defendant was one of the officers of the Exchequer, but only that he is clerk to the remembrancer; and therefore being only a clerk to a clerk, he is not entitled to privilege. (3) It is pleaded, that the barons, *&c.* are intitled to privilege "as long as the court is open," whereas the privilege holds no longer than during their attendance.

To this it was replied, (1) That ſuppoſing the plea to be too general, yet it is good as to the preſent defendant, becauſe ſitting clerks are particularly named, and it appears that he is one. (2) The ſitting clerks are intitled to privilege, as well as a ſer-
* P 46 vant; for thoſe do the buſineſs *of the court; and the ſervant of an auditor is intitled, as appears by the caſes before cited: And in *Landen Jones*'s caſe, who pleaded in the Exchequer, that he was one of the clerks of the prothonotary, his privilege, after great debate, was allowed. *Hardr.* 365. *Thomſ. Entr.* 3, 4. *Robinſ. Entr.* 210. 1 *Lutw.* 43. Beſides, this is matter of law, and the plaintiff ought to have demurred, in order to take advantage thereof.

But the whole court (*Lee* C. J. *abſente*) were of opinion, that the replication is good: For every clerk is entred on a roll, and therefore, whether one be a clerk or not, muſt be tried by record, and not by the country. And *Page* juſt. ſaid, that in the Exchequer every entry, though not on parchment, is a record. And (by *Chapple* juſt.) if there be no inrolment in this caſe, the defendant ſhould have made a *profert* of his writ of privilege, which in ſuch a caſe is a proper way of ſhewing it. As to the plea, they ſaid, that it does not ſufficiently appear thereby that defendant is ſuch an one as is intitled to privilege. For (as *Probyn* juſt. ſaid) the court cannot take judicial notice what is a ſitting clerk; and the privilege of a court

court is not to be extended to the clerk of a clerk And *Chapple* juſt. ſaid, that the clerks of prothonotaries are not intitled to privilege when they are defendants; but the only privilege they have is to ſue out writs of attachment. Beſides, (as *Chapple* juſt. ſaid) the plea is, that defendant is a ſide or ſitting clerk in the disjunctive; whereas before the privilege is tied up to a ſitting one. And the ſubſequent words, " in the diviſion of lord *Maſham*," are not ſufficient to ſhew, that he is a ſitting clerk. And *Page* and *Chapple* juſt. agreed, that the laſt objection to the plea was material. Judgment therefore, that the defendant anſwer over.

*Moore againſt *Wicker.*

S. C. poſt. 191.
*P 47

Declaration in debt for an a mercement in a court-leet, for obſtructing the Jurors from entering the defendant's ſhop and examining his weights, ought to ſhew the time of the attempt to enter, that it may appear to be a reaſonable time. *Qu*: Whether their juriſdiction be not confined to things happening before their being ſworn, or during their ſitting: Alſo whether they have power to enter houſes to examine weights and meaſures: The plaintiff muſt ſhew title as well as a preſentment.

AN action of debt was brought in the court-leet of the manor of *Stepney*, in which the plaintiff (in ſubſtance) declared, that he is lord of the manor of *Stepney*, *&c.* and preſcribes, by way of *que eſtate*, that he hath uſed to have from all thoſe who inhabit or reſide within the ſaid manor a court-leet, *&c.* and then ſets out a cuſtom, that the jurors ſworn and charged at any ſuch leet to preſent have preſented and uſed to preſent at ſuch leet, after their being ſworn, all ſuch things as have been before or after their being ſworn preſentable, and that ſuch jury have been uſed to be adjourned, *&c.* Plaintiff further declares, that the defendant from *October*, 2 *Geo.* 2. till after 28 *May*, 9 *Geo.* 2. lived within the juriſdiction of

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the ſaid court, and uſed the trade of a cheeſemonger; and 1 *December*, 9 *Geo.* 2. the defendant reſiding within the juriſdiction, &c. he did then and there obſtruct the jurors, then in the execution of their office, from entering into his ſhop, and trying his balances and weights, &c. That at a court-leet held in and for the ſaid manor 18 *October*, 9 *Geo.* 2. before ——— *Theed*, Eſq; ſteward of the court, ſeveral jurymen were ſworn to enquire of things preſentable at that court-leet, when it was adjourned to, &c. and then the jury preſented, that the defendant followed the trade of a cheeſemonger, and that 8 *May*, 9 *Geo.* 2. he obſtructed the jurors from entering into his ſhop, and weighing and examining his balances and weights; whereupon he was amerced by the court, and the amerciament was affeered to 4*l.* 19*s.* Defendant pleaded the general iſſue; upon which there was a verdict for the plaintiff.

And a writ of error having been brought on the judgment, the caſe was argued laſt term by Mr. *Clayton* for the plaintiff in error, and by Mr. *Theed* (ſteward of the *Whitechapple* court) for the defendant; and this term it *was again argued by Mr. *Deniſon* for the plaintiff, and ſolicitor general *Strange* for the defendant.

*P 48

On the part of the plaintiff the following errors, amongſt ſeveral others leſs material, were aſſigned; (1) That according to the cuſtom here ſet out, the jury may preſent things ſubſequent to their ſwearing; whereas their power extends only to ſuch as happened before, or during the ſitting of the court. (2) The preſentment here is ill, becauſe the jurors of a leet have no authority to enter into the ſhops of perſons to examine their weights and meaſures. The clerk of the market has indeed ſuch a juriſdiction, but

but this is by an act of parliament. If the jury of a leet has such a power, it must be by custom; and none is here set out: And if there was, it would be a question whether it would be reasonable. Where persons are suspected to have false weights and measures, the antient and proper method of inquiry is, to summon them to bring them in order to be examined by the standard; as appears by the statute of 51 *H.* 3. and 11 *H.* 7. *c.* 4. which are the first and last acts relating to this matter: And there are many precedents of such warrants. But neither the jury of a leet, nor a grand jury, nor justices of peace, can enter into houses for this purpose. Besides, it should have been averred, that the party's weights and measures had not been examined before; for if the jury have a power of entry, it ought to be confined to some limited number of times: And here perhaps they had entered into the party's house the very day before the obstruction. (3) The defendant should have been, not amerced, but, fined by the steward, for obstructing the jurors, supposing that they had a power of entry; this being a contempt of the court, of which the jury was a part: It appearing that they were continued and adjourned to the next court-day. 8 *Co.* 38. *b.* And this suggests another objection, *viz.* that here the jury are parties, accusers and judges; and, as appears by the record, two of them are affeerors. (4), (*a*) The amercement ought to have been not general as here, but a particular *sum, which afterwards should be affeered. *Hob.* 129. S. C. 1 *Roll.* 542. *pl.* 5. (5) The amercement here is by the court, whereas it should have been by the jury. 8 *Co.* 39, 40. 3 *Mod.* 138. 5 *Mod.* 130. (6) The assessment is unreasonable; for by 16 *Car.* 1. *c.* 19. five shillings only is imposed for selling by any weight or measure not according to the standard; and here the defendant is assessed in 4*l.* 19*s.* 11 *Co.* 44. *a.* 2 *Jones* 229.

(*a*) Upon this and the 5th point see 2 Hawk. P. C. *c.* 10. *s.* 18. 19. Fitz G. 109.

* P 49

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It was anſwered, (1) That the jury of a leet may preſent things done, after they are ſworn, and before they are diſcharged, as well as a grand jury; by whom it is frequently practiſed. (2) That the jury of a leet may and ought to inquire into falſe weights and meaſures, appears by the ſtatute of the view of frankpledge, 18 *E.* 2. (*Articles* 25, 26.) which is declaratory only of the common law. And an entry and inſpection is a much ſurer way than a proceeding by way of ſummons; for perſons may have double weights and meaſures, according to the 27th article of the ſtatute: And the jury at the leet cannot adminiſter an oath to the party; ſo that his word muſt be taken, that he has good weights and meaſures. And in fact, the jury have always exerciſed the power of entering into houſes, in order to examine weights and meaſures. (3) As the ſteward came to the knowledge of the defendant's fault by the jury, an amercement is proper, and not a fine; this laſt being only to be impoſed for a contempt in open court. And beſides, an amercement is for the benefit of the party, becauſe here there is a moderator, but in the other caſe none. (4) A general amercement is good, becauſe the affeerment reduces it to a certainty. And this is the conſtant practice. *Salk.* 56, 768. And *Theed* ſaid, that ſo it was determined in the caſe of the high-bailiff of *Weſtminſter*. (5) It has been alſo the practice for the court in ſuch caſes to amerce. (6) The ſum does not appear to be unreaſonable. And laſtly, *Theed* ſaid, that this form of declaring was ſettled by Sir. *Edward Northey*, formerly ſteward of this court.

* P 50 *By *Lee* C. J. None of the objections ſeem to be very material except the ſecond; for the attempt made by the jurors to enter, might poſſibly be after a previous examination of the weights and meaſures. And he objected further, that it ſhould have been

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ſet out to be at a reaſonable time; whereas (for ought appears) it might have been in the night. And *Probyn* juſt. ſaid, that he did not know any law which gave the jury of a leet a power of entering into houſes for examining weights and meaſures, (they being ſworn only to preſent) and ſuch a cuſtom, he thought, would not be good. The proper way, he ſaid, was by ſummons; and there are ſworn ſearchers in a court-leet for examining weights and meaſures upon ſuch a proceeding. *Chapple* juſt. alſo objected, that the obſtruction is firſt ſet out to be 1 *December*, and the preſentment is of a fact done 8 *May*, which are different facts: And in this caſe the plaintiff muſt ſhew a title, and a preſentment alone is not ſufficient; but otherwiſe it is in treſpaſs. *Cro. El.* 885. *Salk.* 107, 108. And

V. 2 Hawk. P. C. c. 10. §. 22.—2 Stra. 847. *Stephens* v. *Haughton*, Fitz G. 46. 108.

By *Probyn* and *Chapple* juſt. the firſt objection is material: For a jury cannot inquire into things done after the adjournment or determination of the court, though they are to make their preſentments at the ſubſequent court; but their juriſdiction is confined to things happening before their ſwearing, or during their ſitting: And ſo it is in the caſe of a grand jury. And here the preſentment is, by the jury of the firſt court-leet, of a fact committed afterwards.

However the whole court were clearly of opinion, that the proceeding was erroneous, in not ſetting out the time of the obſtruction; and were inclined hereupon to reverſe the judgment. But this being a new objection, the caſe was ordered (at the inſtance of the ſolicitor general) to ſtand over for further argument.

Poſt. 191.

Wilks

Wilks againſt *Eames*.

S. C. 2 Stra. 1080.

*P 51

AN action was brought on a policy of inſurance, which was tried by a ſpecial jury, ſtruck at the inſtance of the defendant, at *niſi prius* in *London*; and the plaintiff was therein nonſuited.

The coſts of a ſpecial jury (except thoſe of ſtriking it, which by 3 *Geo.* 2. *c.* 25. are to be paid by the party applying for it) muſt be paid by the loſing party. Note; this was altered by 24 *Geo.* 2 *ch.* 18. which enacts that the party applying ſhall, beſides the coſts of ſtriking, alſo pay all the expences occaſioned by ſuch ſpecial jury, and be allowed only what he would be intitled to, if the trial had been by a common jury; unleſs the judge ſhall immediately after the trial, certify, in open court, under his hand, upon the back of the record, that it was a cauſe proper to be tried by a ſpecial jury.

And it was now moved by ſolicitor general *Strange* for the plaintiff, that the maſter may review his taxation of coſts on the nonſuit, and that twelve guineas allowed for bringing the jury to the bar may be diſallowed and ſtruck out of the bill. And he argued, that the coſts of the ſtriking (which is the word uſed in the ſtatute of 3 *Geo.* 2. *cap.* 25. *ſect.* 16) include all the coſts relating to the jury, that being the proper and legal manner of expreſſing it. And he objected alſo to the *quantum* here allowed; for that a ſpecial jury are intitled to no more than a common one: And though the practice is to pay them more, this is mere matter of generoſity, and ought not to be reimburſed by the other party.

(*a*) Prac. Reg. C. B. 248.

On the other ſide Mr. *Wilbraham* and Mr. *Robinſon* cited the caſe of Sir *John Eyles* (*a*) in the Common Pleas, where it was determined, that the party praying a ſpecial jury ſhould pay the coſts of the ſtriking only, but that the ſubſequent expence ſhould ſtand on the ſame footing with the other coſts. And in Sir *Thomas Wheate*'s caſe, in *Eaſter* term laſt in this court, where a trial had been by a ſpecial jury, ſtruck at the prayer of the plaintiff, and a verdict

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was given for him, it was moved, that the coſts ſubſequent to the ſtriking ſhould be paid to the plaintiff: And a rule to ſhew cauſe was granted; and afterwards made abſolute without oppoſition. And it was alſo ſaid by the defendant's counſel in the principal caſe, that the practice of the exchequer is agreeable with the determination in the ſaid caſe of Sir *John Eyles*.

*P 52 Note; by 24 *Geo.* 2. c. 18. none who ſhall ſerve or be returned on a ſpecial jury ſhall take more than the judge who tries the cauſe, ſhall think juſt and reaſonable, not exceeding one guinea (except in cauſes wherein a view hath been directed.)

Note; In the preſent caſe two guineas a-piece were given to ten of the jurors, and half a guinea a-piece to the other two, theſe being tales-men. And Mr. *Clark*, maſter of the King's Bench office, certified, that he never allowed leſs than a guinea to each ſpecial juror in *London*. And it was ſaid by the maſter of the crown-office, that the practice there was to allow the coſts ſubſequent to the ſtriking.

And the whole court were of opinion, that all the coſts attendant upon trials by ſpecial jury ſtand on the ſame footing now as they did before the act, except the coſts of the ſtriking, and conſequently muſt be paid by the loſer: For the ſtatute muſt not be extended further than the words of it. And *Lee* C. J. ſaid, that he had been informed by the lord chief juſtice of the Common Pleas, *(a)* that it was ſo ſettled, and is the conſtant practice in that court. And the court ſaid, that though it was not uſual, before the ſaid act, to grant ſpecial juries without conſent, yet in ſome inſtances, and for ſpecial cauſes, it was and might be done: And in all caſes where a ſpecial jury was granted, whether with or without conſent, the loſer always paid the coſts: And *Lee* C. J.

(a) Sir John Willes.

(b) 2 Lord Raym. 1364. Stra. 593.

C. J. cited the *King* and *Burridge*, (b) *Paſ. Geo.* 10. where, upon ſearch, it was found, that no ſpecial jury had been granted for thirty years then laſt paſt without conſent; and the lord chief juſtice *Pratt* was there of opinion, that the court might grant a ſpecial jury without conſent; but the other judges differed. As to the *quantum* here allowed, the chief juſtice ſaid, he knew no inſtance where any particular directions had been given as to this point, but the caſe of the corporation of *Bewdley*, which was a trial at bar by a *Worceſterſhire* jury, and there it was directed that five guineas a-piece ſhould be given to the jurors: But, as *Page* juſt. ſaid, that, firſt, went on the common rule for taxation of coſts generally; and afterwards, twenty guineas being allowed to each juror, the court lowered it. So here the plaintiff is to pay the coſts generally; and if the maſter carries them * P 53 * to exceſs, the court may mitigate the allowance. And *Probyn* juſt. ſaid, that he knew no reaſon why ſpecial jurors attending a trial in the country ſhould have more allowed them than a common jury; the other being generally more able and better qualified to ſerve their country than theſe. The motion was therefore denied.

Hamilton againſt *Style*.

S. C. 2 Stra. 1080.

Same point.

AFTER a trial by a ſpecial jury in *Cheſhire*, which was ſtruck at the inſtance of the prevailing party, it was moved that 31*l.* 10*s.* charged for the coſts of the jury, may be diſallowed, and common coſts only taxed. But for the reaſons mentioned in the preceding caſe (immediately after which the preſent was ſtirred, and in which the ſame counſel were concerned) the motion was refuſed.

Chauncey

Chauncey againſt *Needham.*

S. C. 2 Stra. 1081.

A Motion was made, and a rule thereupon granted, *November* 11. in this term, for leave to enter up judgment on an old warrant of attorney, upon an affidavit ſworn *November* 10. that the defendant was living on the *ſaturday* next before the motion. And it was now moved by ſolicitor general *Strange*, to diſcharge that rule, and to ſet aſide the judgment; for that the defendant died at four in the morning of the ſame day, when the former motion was made: And it has been determined, that death is a revocation of ſuch warrant. [Which *Lee* C. J. granted; and he ſaid, there was no need to cite caſes to prove it.] And Mr. ſolicitor objected to the affidavit upon which the rule was made; (1) That the execution of the warrant of attorney was not ſworn by one of the ſubſcribing witneſſes thereto, but only by the plaintiff himſelf. (2) It is not ſworn that the defendant was indebted to the plaintiff * in the money on the warrant of attorney only, but on that "and other ſecurities." (3) It is not ſworn, that the defendant was living at the time of the motion, but on the *ſaturday* before; whereas it is neceſſary that he ſhould be living at the time of the rule granted. *Salk.* 87.

Judgment being entered on a warrant of attorney, by leave of the court, upon an affidavit made the day before, of the defendant's being alive; the court will not ſet it aſide, tho' the defendant died before the motion was made; and tho' if that had appeared, they would not have made the roll to enter judgment. The execution of the warrant not be ſworn to by a ſubſcribing witneſs.

On the other ſide it was argued by Mr. *Noel* and others, that this judgment relates to the beginning of the term, which muſt be conſidered as a ſingle day, of which there can be no fraction, and conſequently is good by relation; and as the defendant was alive in the term, he is to be regarded as living throughout

*P 54

throughout the whole term, as to all judicial purposes. *Shelly*'s caſe, 1 *Co.* 93. *b.* S. C. *Moor* 136. *Poph.* 132. 1 *Leon.* 187. *Cro. Car.* 102. S. C. *Hutt.* 95. S. C. *Hetl.* 72. 1 *Bulſ.* 35. 1 *Salk.* 87. *Fuller* againſt *Jocelin*, executor of lady *Twiſden*. (*a*) There a judgment was entered up on a warrant of attorney within the year, but in vacation-time after the death of the party, and after hearing the caſe three times debated, the court was of opinion, on the authority of *Salk.* 87. that the judgment was good, by way of relation to the firſt day of the preceding term. As to the objections to the affidavit, it was anſwered, (1) That there is no need to prove the execution of the warrant by a ſubſcribing witneſs. (2) It is ſworn, that there was due "on the warrant "of attorney and on other ſecurities 1700*l.*" by which latter words are to be intended other ſecurities for the ſame ſum. Beſides, if part of it be due on the warrant of attorney, it is ſufficient. (3) The affidavit was ſufficient at the time when the rule was granted; and it is now plain there was no intended impoſition on the court. Beſides, as to theſe objections, there is a great difference between making objections to an affidavit at the time of the original motion, and the ſetting aſide a rule already obtained.

(*a*) Poſt 309 2 ſtra. 881. Barnard. K. B. 357. 358, 404.

For theſe reaſons the court were clearly of opinion, that the objections to the affidavit are not ſufficient to ſet aſide the rule, the affidavit being (they ſaid) according to practice and common form. And they were alſo of * opinion, that although no rule would have been granted, if at the time of the motion it had appeared the defendant was dead, this being a revocation of the warrant of attorney; yet as the judgment is now entered, it is made good by way of relation, within the reaſon of *Shelley*'s caſe, and the

*P 55

the other caſes of this nature: And this caſe falls under the rule, *quod factum fieri non debet, ſed factum valet.* And *Lee* C. J. ſaid, that though in the conſideration of facts the time may be particularly computed, yet in legal proceedings, the whole term muſt be conſidered as one day; and the reaſon is, from the nature of buſineſs, and the impoſſibility of looking exactly into the time when things were tranſacted. And (by *Chapple* juſt.) though executions are ſometimes ſet aſide after the death of the defendant, yet this is never done where the execution is teſted before. Motion therefore denied.

S. P. *Seville* v. *Wiltſhire*, Barnes 270. *Fuller* v. *Johnſon*. Caſ. T. Hardw. 158. See *Andrews* v. *Shewell*. Ray. 18. *Sibbet* v. *Ruſſell*. Caſ. T. Hardw. 183.

Bowes againſt *Lucas*.

IN debt for rent, the defendant pleaded *nil debet*; and there was a verdict for the plaintiff. And it was now moved by ſerjeant *Urling*, (by the permiſſion of *Lee* C. J. who tried the cauſe at *Bedford* aſſizes) to ſet aſide the verdict: And the caſe, as proved on the trial, the C. J. reported to be this:

One indebted to the ſame perſon on different contracts, may, at the time of payment, apply it to which he pleaſes, but if he pays it generally the creditor may apply it as he pleaſes.

The defendant was adminiſtrator to one *Perrot*, who was the original leſſee, and died indebted to the plaintiff for rent; and ſince his deceaſe, the defendant had occupied the lands compriſed in *Perrot's* leaſe in his own right as aſſignee, and as ſuch was alſo indebted to the plaintiff for rent. And at the trial it was inſiſted for the defendant, that he had diſcharged all the rent due from him in his own

But, without delivering any opinion upon this exception, the court held the other to be fatal: And they ſaid, that if the words had been [one whereof], it would have been well enough. Order therefore quaſhed.*

* S. P. *Rex*, v. *Standiſh* Bur. S. C. 130—2 Salk. 473. 475. 481. Comb. 200. Poſt. 67. But by 26 *Geo.* 2. *c.* 27. no order ſhall be ſet aſide for this defect only. But *qu.* whether it be not ſtill neceſſary (except in caſes mentioned in 7. *G.* 3. *c.* 21.) that one of the juſtices ſhould in fact be of the *Quorum*. See 3 Burn's Juſ. 567. 568. 16th. Ed.

S. C. Stra. 1056.--Caſ. T. Hardw. 57. 326. 395. 2 Atk. 650. 2 Barnard. B. R. 351. 2 Kely. 148.

Middleton againſt *Crofts*.

In prohibition, the plaintiff tho' he ſucceed only in part, is intitled to his coſts, from the original motion for the prohibition. The ſuit being by huſband and wife, if he die pending it, ſhe is intitled to the coſts.

IN prohibition to a ſuit in the ſpiritual court, againſt *Middleton* and his wife, for marrying clandeſtinely without banns or licenſe, and at a private houſe, and before eight in the morning, *&c.* The defendants below declared, and after a demurrer to the declaration, the huſband died: Notwithſtanding which, at the inſtance of the parties, and as the ſpiritual court might ſtill proceed againſt the wife, the court gave judgment, *viz.* *that the prohibition ſhould ſtand as to the marrying before eight, and that a conſultation ſhould go *quoad* the reſidue of the libel.

And it was moved in *Michaelmas* term laſt by Mr. *Clive*, that the maſter may be directed to tax *Anne Middleton* the wife her coſts, upon the ſtatute of 8, 9 *W.* 3. *c.* 11. (*ſ.* 7.) But no ſuggeſtion being then made upon the roll of the huſband's death, (which the court ſaid, was neceſſary in order to take advantage of the ſaid act) no rule was at that time granted. This ſuggeſtion being afterwards made,

*P 58

made, the ſame matter was again moved in *Hilary* term laſt; and a rule to ſhew cauſe was then granted.

And on the ſide of the motion it was now argued by Mr. *Gundry* and Mr. *Clive*, (1) That if the huſband was living, he would plainly be intitled to coſts, becauſe the libel conſiſts of three diſtinct articles, and as to one of them, the ſuit below is determined to be erroneous; for which wrong proſecution he would be intitled to coſts, according to Dr. *Bentley*'s caſe, *(a)* in the houſe of lords: In that caſe there were ſeveral articles againſt Dr. *Bentley*, as to ſome of which there was a prohibition; and it was held, that he was intitled to his coſts. (2) The wife is intitled to coſts notwithſtanding her huſband's death, this being no abatement of the ſuit, either by the common law, or the act of *W.* 3. *(ſect 7.)* By the common law it is no abatement; (1) Becauſe nothing here is to be recovered: For this is a new method of proceeding, in which the damages are a fiction, (*Plowd.* 471 *b.*) and the prohibition is brought only to diſcharge the defendants below from the encroachment of the ſpiritual court. This caſe therefore is ſimilar to thoſe of *audita querela*, writs of conſpiracy, *&c.* where if one of the plaintiffs dies, the ſuit ſhall go on; according to *Redman*'s caſe, 10 *Co.* 135. *a.* (2) The cauſe of the ſuit here ſurvives to the wife, and ſhe may proceed on the writ already brought, and cannot have a properer; and therefore the ſuit is not abated. 7 *Co.* 26. *b.* *Owen* 13. *Hardr.* 161. The court below *may certainly proceed againſt the wife upon that part of the libel for which a conſultation is granted, and ſhe will be ſubject to coſts there, (for by the civil law no action abates by death or otherwiſe) and therefore it is reaſonable that the prohibition

(a) 4 Bro. P. C. 41.

* P 59

prohibition ſhould not abate, and that ſhe ought to recover her coſts in this court: Here ſhe hath obtained judgment, and the coſts follow of courſe. And ſhe may be alſo acquitted upon that part, for which there is a conſultation. That the defendants below are huſband and wife, makes no difference in the preſent caſe; for though as to matters of property, huſband and wife are conſidered as one perſon, yet as to crimes they are regarded as two diſtinct perſons: And this is a ſuit againſt them *criminaliter*, and not *civiliter*. It is a diſtinct offence in each, for which they were liable to be puniſhed ſeverally by penance; and the ſuit below ſurvives againſt the woman. 11 *Co.* 61. *b.* Beſides, it being laid in the declaration, that the proceeding in the ſpiritual court is to the damage of the huſband and wife, the judgment muſt be, that they recover their damages and coſts, though the huſband alone expended the money for the coſts. 1 *Roll.* 516. But ſuppoſing that by the common law this ſuit was abated by the death of the huſband, this is altered by the ſtatute of *W.* 3. *(ſect.* 7.) for the cauſe of action ſurvives to the wife, who may proceed on the writ already brought; and the act makes no difference between the caſes, where baron and feme, and where others, are plaintiffs. And that the huſband and wife are here to be conſidered as two diſtinct perſons, is plain by what is before mentioned. (3) If the wife is intitled to any coſts, ſhe muſt have them from the firſt motion for the prohibition: And ſo it was determined in *Swetnam* and *Archer*, in the exchequer, *Hil.* 12 *Geo.* 1. upon the authority of *Horton* and *Starkey*, (*b*) cited in that caſe by baron *Forteſcue*. And this alſo appears by Dr. *Bentley*'s caſe.

(*b*) Stra. 82. Fort. 348.

On

On the other ſide it was argued by ſolicitor general *Strange* and ſerjeant *Wynne*, (1) That this is not a caſe within the ſtatute as to coſts: For the words [obtaining *judgment] muſt be underſtood of an effectual judgment on the merits, whereas here the plaintiff below has prevailed in the ſubſtantial part of the charge, *viz.* the clandeſtine marriage of the parties; and has failed only in the ſingle circumſtance, of their marrying at an improper time. Beſides, in prohibition both parties are actors; and therefore, where the prohibition is ordered to ſtand for part, and a conſultation is awarded for other part, they are equally in reaſon intitled to ſuch coſts, for ſuch part as they have reſpectively prevailed therein; which is all one as if neither was intitled. In the preſent caſe the plaintiff below has rather prevailed, as he has made good two parts out of three; and therefore if the defendants below are intitled to coſts, *a fortiori* he is ſo too. [But to this it was anſwered by the court, that at common law two judgments cannot be given for coſts, though this be often done in equity.] As to Dr. *Bentley*'s caſe, the houſe of lords, where that was, exerciſes a diſcretionary power in giving coſts; which they ſometimes allow in caſes where they are not given below. [But this the court denied.] (2) The wife is not intitled to coſts, becauſe by the death of the huſband before judgment the ſuit was abated; and the wife may apply for a new prohibition, ſo that it is not prejudicial to her. *Bro. Brief*, 272. *Co. Lit.* 85. *a.* *Style* 138. *Cro. Car.* 509. 10 *Co.* 134. It is alſo material that this ſuit is by huſband and wife, who are conſidered as one perſon; and the huſband only is ſubject to damages and coſts, or to an amercement *pro falſo clamore*, the wife being ſuppoſed to be joined for conformity only: And therefore it is not reaſonable that coſts ſhould be paid

* P 60

paid to the wife, when ſhe herſelf would not be ſubject to coſts if judgment had been againſt her. As the huſband only is at the expence of carrying on the ſuit, the coſts ought to be paid to his repreſentative if he prevails. *Bro. Baron* and *Feme*, 16. *Fitz. Coron.* 276. *Hob.* 98, 129, 177. As to the ſtatute of *W.* 3. this is not calculated for caſes where huſband and wife are plaintiffs, and the huſband dies, becauſe ſuch action is conſidered as the ſuit only of the huſband, and he alone is at the expence of it.
*P 61 And in this *caſe, if the wife was to go on, it is a queſtion, whether ſhe can be charged with any coſts for that part in which the plaintiff below has ſucceeded; at leaſt, further than her own time. As to the third point, it was admitted by the defendant's counſel, that ſuppoſing the plaintiff to be intitled to coſts, theſe muſt attach from the time of the firſt application for the prohibition, according to the caſes cited for that purpoſe.

Upon the firſt argument of this caſe it was ſaid by lord *Hardwicke*, then chief juſtice of this court, that where a prohibition goes to part, and a conſultation to other part, it is a ſettled point, that the plaintiff in prohibition is intitled to his coſts, the words of the act being, [or any award of execution.] And the whole court were now clearly of opinion as to the other points, that notwithſtanding the death of the huſband, the wife is intitled to coſts: For (1) This is no abatement of the ſuit, by the rules of the common law, becauſe if the ſuit was abated thereby, the wife could not have a different writ as to form, or proceed in another manner than ſhe did before. And therefore this materially differs from the caſe of coparceners, where if one dies, though there was ſummons and ſeverance, that will be an abatement: And the reaſon is, becauſe the ſurvivor hath now the whole deſcended to her, whereas

whereas before ſhe was intitled to a moiety, and therefore her writ varies. There is alſo an eſtabliſhed difference, which is applicable to this caſe, between an action or ſuit brought for recovering ſomething, and where it is only to diſcharge the parties; in which laſt caſe the death of one is no abatement. (2) Suppoſing that this ſuit was abated by the common law, yet it is continued by the ſtatute, as the cauſe of action ſurvives; for the wife is ſubject to penance and excommunication. And though in many caſes the huſband and wife are conſidered as one perſon, and one is frequently joined for conformity; yet in this and other caſes where they are proceeded againſt *criminaliter*, they are real parties, and as much diſtinct as two other perſons. And *Probyn* juſt. ſaid, that if the *wife is condemned below, he believed that ſhe muſt pay the whole coſts from the beginning of the cauſe. * P 62

The court were alſo clearly of opinion, that coſts muſt be allowed from the time of the original motion for the prohibition: And ſo *Lee* C. J. ſaid, it was determined in *Berry* and *Croſs*, (c) *Eaſter* 1 *Geo.* 2. Motion therefore granted. (c) Cited Stra. 82.

The

6. C. Bur. S. C. 116.

The inhabitants of Fyfield Magdalen and *Weſtower.*

An hiring and ſervice for a year, tho' not under the ſame contract, gain a ſettlement, if the diſcontinuance do not exceed a day.

AN order was made by two juſtices for the removal of *William Trim* and his wife and five children from *Weſtower* to *Fyfield Magdalen*, as the place of their laſt legal ſettlement; which, upon appeal, was confirmed by the ſeſſions: And the caſe, as ſet out in the ſeſſions order, was this:

William Trim, the pauper, was hired at *Fyfield Magdalen* from *Midſummer* to *Lady-day* at forty Shillings wages, which time he ſerved with his maſter. And on *Lady-day* he received his wages, and on the ſame day, by his maſter's conſent, went to his father's houſe, and after an hour's abſence, by his father's advice, he returned to his maſter, and was hired by him for a year at 3*l.* 10*s.* wages, and continued with him for half a year only, under this laſt contract.

It was moved by Mr. *Gundry*, that both orders might be quaſhed; (1) Becauſe not only an hiring for a year is neceſſary to gain a ſettlement, by 3, 4 *W. & M. c.* 11. but alſo a continuance in the ſame ſervice for a year, by 8, 9 *W.* 3. *c.* 30. (*ſect.* 4.) And what makes this caſe much the ſtronger is, that the pauper left his maſter and went to his father; and though he ſtayed with him for an hour only, yet, for
* P 63 that time, he was his own maſter: *And if an hour's abſence is not a diſcontinuance of the ſervice, by parity of reaſon an abſence for a week, or a month, is not ſuch. The ſtatutes relating to this point ought not to be extended by an equitable conſtruction beyond the letter, becauſe the ſervant muſt have a ſettlement

tlement ſome where or other, and it is alike to him by what pariſh he is maintained. And as to the hiring, where one is hired for two half years to two different maſters in the ſame pariſh, this will not conſtitute a ſettlement. (2) Suppoſing that the father hath gained a ſettlement at *Fyfield M.* yet it doth not appear that the children are ſettled there: For the caſe, as ſet out in the ſeſſions order, relates only to the father; whereas the children may have gained a ſettlement elſewhere, eſpecially as their ages are not mentioned.

V. Bur. S. C. 89. 99. 138. 162. 178.

On the other ſide ſerjeant *Huſſey* cited *The King* and *the inhabitants of Aynhoe*, (*a*) in lord *Raymond's* time; and *The inhabitants of Brightwel* and *Weſthanning*, (*b*) *Hil.* 1 *Geo.* 1. in both which caſes, he ſaid, it was determined, that an hiring and ſervice for a year, upon different contracts, to the ſame perſon, is ſufficient to gain a ſettlement.

(*a*) Fitz G. 3. Bott 189. Foley 144. 2 Lord Raym. 1511.

(*b*) 10 Mod. 287. 1 Seſs. Ca. 92.

Lee C. J. When the court firſt came to the reſolution mentioned at the bar, which was in the time of lord *Macclesfield*, Sir *Thomas Powys* heſitated; but however it was determined, that if there be an hiring for a year and a ſervice for a year, it is ſufficient to gain a ſettlement, though it be not on the ſame contract: And the reaſons which lord *Macclesfield* went upon were, that this was agreeable to the words of the act, and that the ground of making an hiring and ſervice for a year neceſſary to gain a ſettlement is, the credit given to the ſervant by ſuch an hiring, and the ſervice reſulting to the pariſh by his labour: Both of which are exactly the ſame, whether the hiring be on one or different contracts. And in the caſe of *The inhabitants of Ivinghoe* and *Solebury*, (*c*) where a ſervant lived with a farmer for half a year, and continued the remainder of the year with an aſſignee

(*c*) Stra. 90. Fort. 317. Sett. & Rem. 81.

* P 64 nee on the ſame farm, *it was determined, that thereby he gained a ſettlement. As to the abſence of the pauper in the preſent caſe for an hour, this is not ſuch a diſcontinuance as is ſufficient to prevent his gaining a ſettlement: And it would be a hard conſtruction indeed, to make ſo ſhort an abſence amount to an abſolute diſſolution. The other objection is not material; for by the firſt order, the huſband, wife and children are removed to *F.* as the place of their laſt legal ſettlement; and this order, that of the ſeſſions confirms, and only ſtates the fact on which the doubt aroſe: Both orders muſt be taken together.

The reſt of the court were of the ſame opinion: And *Probyn* juſt. ſaid, that the ſtatutes mentioned are in reſtraint of the liberty of the ſubject, a reſidence of forty days being before ſufficient to gain a ſettlement, and therefore they muſt be conſtrued in a liberal manner. And (by *Chapple* juſt.) upon the laſt day of the firſt contract, and the firſt day of the ſecond contract, the pauper muſt be conſidered as being in his maſter's ſervice throughout the whole day. Both orders were therefore confirmed.†

† See Rex v. *Sulgrave* 1 Term Rep. B. R. 778.—Bur. Set. Cas. 256. 280. 461. 545. Doug. 296. Cald. 4. 66.

The

The King againſt *Bell and his wife.*

JOHN *Bell* and his wife being brought up by *habeas corpus*, (by the return whereof it appeared that they were committed for felony, in ſtealing goods belonging to the guardians of the poor of *Canterbury*) it was moved by Mr. *Ketelby*, that they may be bailed, upon affidavits by the parties themſelves, that this was a groundleſs and malicious proſecution: And it was alſo ſworn by others, that two ſeſſions had paſſed at *Canterbury* ſince the defendants commitment without any trial, though the parties themſelves had endeavoured to bring it on; the intereſt of the goods, charged to be ſtolen, being veſted in the ſaid guardians, who are the magiſtrates of the city, and conſequently incapable of trying the cauſe. And Mr. *Taylor* * (of counſel alſo with the defendants) cited 2 *Jones* 222. 5 *Mod.* 323. and *Jackſon's* caſe, mentioned in 2 *Hawk. P. C.* 113.

Priſoners committed for felony, admitted to bail, their trial having been delayed.

* P 65

It was objected by ſerjeant *Urling* to the reading of the affidavits by the defendants, that they being charged with felony, this would be (in effect) to purge themſelves thereof.

But the court ſaid, that they might make uſe of any means for receiving light in the caſe, in order to guide their diſcretion: And to be ſure the court will not place an undue credit on the affidavits of the parties themſelves. Whereupon the affidavits of the defendants were read.

And

And the parties were ordered to be bailed, it appearing very doubtful, whether the huſband was guilty or not; and almoſt plain, that the wife was not. And *Lee* C. J. ſaid, that in the caſe of ſimple felony (as grand larceny) if huſband and wife are found guilty on an indictment againſt them, the wife muſt be acquitted. But the principal reaſon of admitting the defendants to bail was, that they might have been tried before, there having been an aſſizes ſince their commitment: And C. J. ſaid, he remembered a ſimilar caſe; where on account of a delay the defendant was bailed.

Holcroft againſt *Collweſt.*

Whether in *B. R.* the *Venue* may be changed in an action on a promiſſory note.

MOTION by Mr. *Clayton* to diſcharge a rule granted on the common affidavit for changing the *venue* from *London* to *Lancaſter*, in an action upon a promiſſory note. And he argued, that the *venue* is never changed in actions on bonds; and there is the ſame reaſon againſt changing the *venue* in the caſe of notes, theſe being conſidered, ſince the late ſtatute, in the nature of ſpecialties: And the
* P 66 ſame requiſites are neceſſary to be proved at the *trial in both caſes. And for theſe reaſons, he ſaid, in the Common Pleas the *venue* is always refuſed to be changed. He alſo cited *Salk.* 699. *Elliot* and *Mann*, *Hil.* 2 *Geo.* 2. in this court. There, in an action on an inland bill of exchange, it was moved to change the *venue*; but it was never determined. And he mentioned other caſes, but none in point.

The

The whole court (except *Chapple* juſt.) were againſt diſcharging the rule for changing the *venue*: And they ſaid, that whatever the practice of the Common Pleas may be, there is no inſtance where, in this court, the *venue* was refuſed to be changed in actions on promiſſory notes. And *Page* juſt. ſaid, there is no difference between an action on a note of hand, and one on a parol promiſe; both being actions on the caſe, and the note is only evidence of the debt: And the ſtatute doth not alter the nature of the action. But *Chapple* juſt. inclined to the contrary. For (he ſaid) in actions on a deed, or ſpecialty, the *venue* is never changed: and the books relating to mercantile affairs call promiſſory notes by the name of ſpecialties. And as theſe notes now frequently paſs through many indorſements, a great deal of proof may lie on the plaintiff. And he cited the following caſes, all of which were in the Common Pleas. *Vigars* and *Vigars*, *Trin.* 9 *Geo.* 2. Motion to change the *venue* in an action on a promiſſory note; but denied. *Ward* and *Cocklow*, (*a*) in the ſame term. In the caſe of a note, the like motion was made, and denied. *Lutwich* and *Wilcox.* (*b*) Motion in that caſe to change the *venue* in an action upon a policy of inſurance, from *Cumberland* to *Briſtol*, or the adjacent county. And the court ſaid, that in actions on promiſſory notes, it was not the practice to change the *venue*, but that it might be different in the caſes of policies. However, the motion being to change the *venue* into an adjacent county, it was denied.

In the principal caſe a rule was granted to ſhew cauſe, *&c.*†

(*a*) Barnes. 480.

(*b*) Barnes. 482. So *Rice* v. *Vinall* Barnes 483. *Watſon* v. *Willis*, Barnes 485. *Maugir* v. *Hinds*. Barnes 487. *Bedford* v. *Bray*. Barnes 491. *Litſon* v. *Cocke*. Barnes 492. *Downes* v. *Brian*. 2 Blackſt. 993.

† See 1 Wils. 41.—*Kirl* v. *Bread*. Say. 7.—*Venue* changed in B. R. in ſuch actions.

The

* P 67 **The King* againſt *the inhabitants of Kay [or Wray]*.

Order of removal quaſhed, it not appearing thereon that one of the Juſtices was of the *quorum*. Ante. 57.

AN order of removal made by two juſtices was now quaſhed, becauſe it did not appear that one of them was of the *quorum*; the words of the order being [both juſtices named in the ſecond aſſignment]. And the court ſaid, they could not take judicial notice what is the meaning of theſe words.

Hereupon it was prayed by ſerjeant *Huſſey*, (who argued in ſupport of the order) that the order might be amended here, or remanded, for that purpoſe. But as the point to be amended was matter of fact, and there was nothing to amend by, it was refuſed.

French qui tam againſt *Wiltſhire*.

Objection that the *Venire* was awarded in *Hilary* term, and was returnable in *Trinity* term after, overruled, there being proper continuances on the plea

AN action *qui tam* was brought againſt the defendant for exceſſive gaming, upon the ſtatute of 9 *A. c.* 14. and a verdict and judgment having been obtained againſt him, it was now moved by ſerjeant *Parker*, in arreſt of judgment, (1) That the *venire facias* is awarded in *Hilary* term, and returnable *Trinity* term after; ſo that nothing appears to have been done in *Eaſter* term: And conſequently here is a diſcontinuance. (2) In the declaration the

roll; and the want of them on the *niſi prius* roll is not material.—In an action on the ſtatute againſt gaming, the declaration concludes "whereby the action accrued to *the King, the poor of the pariſh*, and the informer" (whereas the action is only given to the informer) the words "*the King, the poor of the pariſh*" are mere ſurpluſage. The panel being annexed to the *Diſtringas* is a good return.

words

words are, [by which the action accrued to the King, the poor of the parish, and the informer] which is false, and a misrecital of the act; for thereby the action is given to the informer only. (3) The *distringas* is *album breve* without any return to it.

In answer to the last objection, [which is the most material] it was argued by the serjeants *Bellfield* and *Burnet*, and others, that if the *venire facias* had been *album*, the **distringas* would be ill; but as that, which is the principal process, is right, and well returned, the other is amendable by 8 *H.* 6. *c.* 15. as this is only the default of the sheriff. 1 *Roll.* 204. *pl.* 2, 3. 5 *Co.* 41. *b.* *Yelv.* 110. *Cro. Jac.* 443, 528. 2 *Rolle Rep.* 210. *Hob.* 130. It is also helped by 5 *Geo.* 1. *c.* 13. which extends to popular actions, these being not mentioned in the exception: And this act (it was said) lord *King* used to call an omnipotent one. Besides, as a *distringas* is only a mesne process to compel the jury to come in, and in this case they did actually appear, though the *distringas* be *album breve*, this is not material. So in *Widdrington* and *Charleton*, (*a*) which was an appeal by a wife of the death of her husband, the omission, in the *exigent*, of the words "*de morte viri sui, &c.*" was held to be cured by the appearance of the defendant.

* P 68

(*a*) 1 Mod. 86. Salk. 60. Cas. T. Hardw. 39. Stra. 155. 3 Atk. 570. 2 Barnard. B. R. 348. 2 *Hawk. P. C. c.* 27. *s.* 107. post. 142.

It was argued by solicitor general *Strange* and serjeant *Parker*, by way of reply, that improper returns only are amendable by the statute of *H.* 6. but in this case there is nothing for that act to operate upon, there being no return: So that here a return must be added, and not amended. *Yelv.* 110. And as to the act of *Geo.* 1. this extends only to bills and writs, but not to returns. The other argument, that this defect is cured by the appearance of the jury, proves too much; for if so, it would be the same in the case of a *venire facias*: And yet an act of parliament was

thought neceſſary to cure defaults there. But the whole court, *Lee* C. J. *abſente*, were clearly of opinion, that none of the objections are material; for as to the firſt, there are proper continuances entered upon the plea roll; and the want of them on the *niſi prius* roll is not material. (a) The words objected to in the declaration are mere ſurpluſage: For if it had been ſaid only, "*per quod actio accrevit*," it would have been ſufficient. And (by *Page* juſt.) if it had been added [to *John a Styles*] this would not have vitiated the declaration, becauſe the laſt words would be intirely inſignificant. But as to the laſt objection, * P 69 the court delivered no opinion, becauſe it * appeared that the panel was annexed to the *diſtringas*; and this, they ſaid, was a good return. But (by *Page* juſt.) a bad return is none at all; and by the * ſtatute a bad one is amendable. And he cited a caſe of *The biſhop of Worceſter* and *Sir John Barnard*, (b) in the time of lord *Holt*, where the *venire* was right, but the *diſtringas* omitted the name of one of the defendants; and, upon his motion, it was held well enough.

* Vide 12 Jac. 1. c. 13.

(b) See Salk. 48.

After the court had delivered their opinions, *ut ſupra*, Mr. ſolicitor general ſtarted another objection, *viz.* that this *venire facias* is *de corpore comitatus*, and the ſtatute of 4, 5 *A. c.* 16. excepts actions on penal ſtatutes; and by the common law, the jury muſt come *de vicineto*. Whereupon the caſe was ordered to ſtand over.

Poſt. 99.

Cart

Cart againſt *Marſh.*

S. C. 2 Stra. 1080.

A Prohibition was prayed laſt term by Mr. *Deniſon*, to an appeal depending in the court of arches; and a rule to ſhew cauſe was then granted; and the caſe was this:

An appeal lies from the ordinary to the metropolitan, in a matter relating to the putting up of a monument in a church.

The executor of one *Jane Cart* petitioned the ordinary for a licence to erect a monument to the memory of the ſaid *Cart*, in a particular place in *Dunſtable* church: And there was alſo another petition by the executrix of *Barbara Marſh*, for a licence to ſet up a monument to *Marſh*'s memory in the ſame place in the ſaid church. But the executrix of *Marſh* finding the ordinary inclinable, on being attended by the parties, to determine the matter in favour of the other executor, ſhe appealed to the arches before any licence was granted, and was now proceeding on the ſaid appeal.

It was now argued by Dr. *Paul*, his Majeſty's advocate general, and by others, againſt the prohibiton; and by * ſerjeant *Wright* and Mr. *Deniſon* in favour thereof. And by theſe laſt it was urged, amongſt other things, that the granting of faculties in this caſe is a matter of a diſcretionary, and not of a contentious juriſdiction; for a licence confers no intereſt, but the foundation of the power of granting it is only to prevent the erecting of any thing indecent or ſuperſtitious: And therefore the ordinary has the ſole

* P 70

power, all one as in the certifying of marriage or baſtardy, and cannot be controuled by the archbiſhop in the exerciſe thereof. 4 *Inſt.* 337. *Hob.* 69. 12 *Co.* 105. And though the preſent queſtion is a diſpute between two eccleſiaſtical judges, yet this court may interpoſe by way of prohibition. *Hob.* 17. *Cro. Jac.* 366. 2 *Roll.* 313. And, on this ſide, many other caſes were cited.

But (by the whole court) an appeal lies in this caſe from the ordinary to the arches. And therefore they refuſed a prohibition. *Ex relatione alterius.*

S.C. 2 Stra. 1079.

Turner againſt *Warren.*

Plaintiff ſuing on Stat. of *Anne* for money won from him at play, is intitled to ſpecial bail. Supplemental affidavit allowed to be read, to ſhew how much had been loſt at each ſitting; and that it was loſt within 3 months before the bringing of the action; as it was explanatory only.

IN an action of debt for 200l. upon the game-act of 9 *A. c.* 14. the defendant was arreſted on an affidavit, that he was indebted to the plaintiff in 151*l.* 4*s.* for money won of him at play, without mentioning how much was won at each time. And in *Trinity* term laſt it was moved by ſolicitor general *Strange*, that the bail-bond may be delivered up, and common bail accepted; And he ſaid, that in actions upon penal ſtatutes ſpecial bail is never required; and this, he inſiſted, was the preſent caſe, the money for which the action is brought not being due as on a contract, but given by the ſtatute to the loſer; and if he doth not ſue, to any other perſon: And therefore it is to be conſidered as a penalty.

On the other ſide it was then argued by Mr. *Marſh*, that although it muſt be admitted, where a

penalty

penalty is *given to common informers, ſpecial bail is not required, yet otherwiſe it is where it is given to the party aggrieved. And in this caſe the money ſued for is not properly a penalty, but is to be conſidered as received by the defendant for the uſe of the plaintiff, as he came by it by unlawful means: And it is like the caſes, where money is paid by compulſion, or without conſideration. If the action had been brought by an informer, the money ſued for muſt indeed be regarded as a penalty, becauſe he never had a property in it; but it makes a great difference, that here the loſer is the plaintiff: And the ſame ſtatute may in one part be remedial, and in another penal. * P 71

And on the ſame ſide an affidavit was produced, that 49*l.* were won at one time, and ſeveral other ſums at other times, amounting to more than 10*l.* at each ſitting; all which together make up the ſaid 151*l.* 4*s.* and that the money was loſt within three months before the bringing of the action. And though Mr. ſolicitor objected to the reading of this affidavit, as being contrary to practice, yet the court permitted it to be read, as it was explanatory only.

When this caſe was firſt argued, the court (*Lee* C. J. *abſente*) ſeemed divided in opinion. *Page* juſt. was of opinion, that the plaintiff was entitled to bail; for that the act makes the money won a debt; and it has in effect enacted, that the winner owes ſo much to the loſer. But *Probyn* and *Chapple* juſt. ſeemed inclined to the contrary, becauſe here the property of the money was abſolutely deveſted; and therefore this caſe materially differs from thoſe where money is paid without conſideration: And conſequently there is no difference, as to the preſent point, between common informers and the perſons aggrieved. And *Chapple* juſt. ſaid, that it was determined in the Com-

mon

mon Pleas, by the lord chief juſtice *Eyre*, that if more than 10*l.* is won, and no ſecurity given, the winner may, notwithſtanding the ſtatute, by an action recover the money: And *Chapple* juſt. ſaid, he
* P 72 was of the ſame opinion; * and that in ſuch caſe the loſer cannot recover the money back again, the act extending only to ſuch caſes where the money is paid.

However, the matter in queſtion being a new point, the caſe was then adjourned: And this term it was again ſtirred and argued. And (as it was reported to me) it was now determited by *Lee* C. J. and the whole court, that as the loſer is entitled by the ſtatute to an action for the money loſt, as for money received to his uſe, and the money is therein conſidered as a debt, the act is not penal, but more properly remedial; and therefore the plaintiff is intitled to bail. And the rule before granted to ſhew cauſe, for giving up the bail-bond, was now diſcharged.

The King againſt *the juſtices of Middleſex.*

Order appointing ſcavengers quaſhed, for not ſhewing that the perſons appointed were *able perſons.*

MOTION by Sir *Thomas Abney*, to quaſh an order of two juſtices appointing ſcavengers for *St. Giles*'s pariſh in *London*, becauſe the perſons elected are ſet out in the order to be tradeſmen, without ſhewing that they are able perſons; as is required by 2 *W.* & *M. ſeſſ.* 2. *c.* 8. (*ſect.* 9.) And he ſaid, that many orders on 43 *Eliz. c.* 2. have been quaſhed for not ſetting out the overſeers to be ſubſtantial houſholders, as that act requires. And it being admitted by ſerjeant *Parker* on the other ſide, that the above exception was fatal, the order was quaſhed. *Ex relatione alterius.*

The

The inhabitants of Henningham and *Finchingfield.*

S.C. Bur. S. C. 112. poſt. 208.

An order of removal made by two juſtices, after an appeal from an order made by two juſtices to remove the ſame perſons, quaſhed. A return to a *certiorari*, of orders varying from thoſe deſcribed in the writ, is bad.

AN order of removal was made by two juſtices, from which there was an appeal to the ſeſſions; who *firſt made an order reſpiting the matter: And at the ſecond ſeſſions they made an order of reference to the opinion of the judge of aſſize, without any adjournment. An opinion being given thereon by the judge of aſſize, the ſubſequent ſeſſions reſume the matter, and ſet aſide the order of two juſtices, agreeable to the judge's opinion. And after this, an order is made by two other juſtices for removal of the paupers from the place to which they were ſent by the original order.

And it was moved by Mr. *Baldwin* laſt *Eaſter* term, that the firſt order of the two juſtices may be confirmed, and all the others quaſhed; and he objected to the orders of the ſeſſions; (1) †That in the ſecond there is no adjournment, but only a reference to the judge of aſſize; ſo that here is a diſcontinuance. (2) This order is made *ex parte*, it not appearing that there was any ſummons to the other ſide to appear. (3) In the laſt order, there is no adjudication, that the place to which the paupers are removed is the place of their ſettlement. And it was objected to the laſt order of the two juſtices, that after the appeal they had no power in the caſe, their juriſdiction being thereby wholly determined. The only way was to ſerve the churchwardens with a copy of the preceding order.

* P 73

† See poſt. 208. The order quaſhed on this objection. See *Rex* v. *Reading*. Cas. T. Hardw. 79.

On

On the other ſide it was this term argued by ſerjeant *Price*, (1) That the reference to the determination of the judge of aſſize amounts to an adjournment. (2) It appears that before the reference the parties were heard on both ſides; and after the judge's deciſive opinion, nothing further could be ſaid on either ſide. (3) The ſetting aſide or confirming orders of removal is an adjudication as to the place of ſettlement. As to the laſt order of the two juſtices, he admitted the objection made to it to be fatal. But then he inſiſted, (and this he principally relied on) that the return to the *certiorari* is inſufficient, for that the orders, at leaſt four of them, are to remove "*A. B.* and *E.* "his wife and two daughters, and the children of "*A. B.* and *E.* his ſaid wife;" and the *certiorari* is,
*P 74 to remove *all orders for the removal of "*A. B.* "and *E.* his wife and the children of *A. B.*" And he cited *Hob.* 327. *Salk.* 145, 452.

And it was held by the whole court, that for this reaſon the orders are not removed; and therefore they delivered no opinion upon the objections to the orders.

When this caſe was firſt ſtirred, it was ſaid by *Probyn* juſt. that he ſhould be willing to go as far as poſſible in making a reference to a judge of aſſize amount to an adjournment. And that after ſuch judge has given his opinion, and this has been conformed to, it is a great diſreſpect to the judge to move to quaſh the orders made thereupon, becauſe there is no formal adjournment from ſeſſions to ſeſſions. *Ex relatione alterius.*

Hook againſt *Shipp*.

S.C. 2 Stra. 1080.

ERROR of a judgment in the Common Pleas, in an action upon a promiſſory note. And it was aſſigned for error by Mr. *Taylor*, that the writ of inquiry is teſted *Philip* lord *Hardwicke*, whereas he was then chief juſtice of this court, and Sir *John Willes*, chief juſtice of the Common Pleas: And it appears by the record, that Sir *John Willes* was chief juſtice of this laſt court. As the teſte therefore is falſe, the ſheriff had no proper commiſſion to proceed upon.

B. R. will not judicially take notice who are judges of C. B. If a writ be teſted in the name of a perſon, as Ch. Juſtice, who is not ſo, it is matter of irregularity, not of Error.

On the other ſide it was argued by ſolicitor general *Strange*, that the court is not obliged to take judicial notice, that lord *Hardwicke* was not chief juſtice of the Common Pleas: For though he was then chief juſtice of this court, he might be ſo of the other too; and there has been a time when the ſame perſon was chief juſtice of both courts at the ſame time, or at leaſt juſticiary, which is higher. Beſides, this is matter of irregularity only, and *therefore proper to be taken advantage of, not by writ of error, but by way of motion. And Mr. ſolicitor cited the caſe of *The King* and *Mann* (wherein he ſaid he was counſel) reported in *Fitzgibbons*; a book of ſmall authority.

* P 75

No caſe of this name in Fitz G.

And the whole court (*Lee* C. J. *abſente*) were of opinion, that this is not a good cauſe of error; (1) Becauſe this court is not obliged to take notice of any

any other of the judges of *Weſtminſter-hall*, beſides thoſe of its own; and though it does appear by the proceedings, that Sir *John Willes* was chief juſtice of the Common Pleas at the commencement thereof, yet another might be ſuch afterwards: And as it does not appear on record, that lord *Hardwicke* was not chief juſtice of that court at the time of ſuing out the writ of inquiry, it is not to be intended. (2) This is matter purely of irregularity. And *Chapple* juſt. ſaid, that a wrong teſte will not make a writ void, but irregular only: And he cited 1 *Roll.* 757. *pl.* 7. *Yelv.* 33. The judgment was therefore affirmed. *Ex relatione alterius.*

Godfrey againſt *Duberry.*

Demurrer to the declaration, for that the defendant is named in the original writ *Joſeph*, and in the declaration *Joſoph*, over-ruled; for 1ſt. The variance is not material; 2dly. The defendant did not pray *Oyer* of the original: 3dly. It is cured by defendant's ſaying, "The *aforeſaid Joſeph*: 4thly. It is matter, not of demurrer, but of plea in abatement

AN action was brought by original; and the defendant demurred to the declaration, and aſſigned for cauſe of demurrer, that he, the defendant, is named in the writ *Joſeph*, and in the declaration *Joſoph*, with an [*o*] inſtead of an [*e*]. And it was now urged by Mr. *Benny* for the defendant, that this variance is fatal, eſpecially as it is aſſigned for cauſe of demurrer: Though perhaps it might be otherwiſe if it had been after a verdict. And he cited 5 *Co.* 37. 1 *Roll. Rep.* 432. 1 *Show.* 193. 3 *Mod.* 136.

On

and the defendant's counſel have not read
f.

o which it was replied, that the plaintiff's join- * P 76
demurrer is a confeſſion that the defendant has
ightly. And here the plaintiff ſhould have re-
that he is known by both names.
the whole court (*Lee* C. J. *abſente*) were of opi-
that this is not a material variance. And *Page* 2 Salk 658.
aid, that no variance between a writ and count 2 Wilſ. 85.
taken advantage of, without praying *oyer* of the 2 Kely. 138.
Beſides, the preſent variance (as *Probyn* juſt.
is cured by the defendant's ſaying, "the afore-
oſeph D." For if there had been no chriſtian
theſe words would have made it ſufficient.
er Chapple juſt. this matter is pleadable in abate-
and not proper to be taken advantage of by
rer. Judgment for the plaintiff. *Ex relatione*
r.

Hoppen againſt *Leppett*.

S.C. 2 Stra. 1082. by name of *Openheimer* v. *Levy*.

CTION on the caſe upon ſeveral promiſes.— Plea that the plaintiff is an *Alien*, muſt ſtate that he is an Alien *Enemy*.
The defendant pleads in abatement, that the
ff is an alien born in *Germany* out of the King's
nce, &c. and to this the plaintiff demurs.
d it was argued by ſerjeant *Draper* for the
ff, that this plea is plainly ill; for an alien-
may bring a perſonal action, though an alien-
cannot. And a plea in abatement muſt be
to every intent; and therefore the defendant
ſhould

And after the execution of the writ of inquiry, (in which leſs damages by a ſhilling were given than what defendant confeſſes by his plea) it was moved by ſerjeant *Draper*, that this writ of inquiry may be amended by the judgment roll, *viz.* by ſtriking out the words "by the occaſion aforeſaid," and ſubſtituting inſtead of them, "by reaſon of "not performing the undertakings above menti-
*P 78 "oned."

*And it was now urged by Mr. *Lacey* againſt the motion, that the ſtatute of 8 *H.* 6. *c.* 12. upon which it is founded, extends only to ſmall amendments, as of a letter or word, and to the mere miſtakes of clerks; whereas the amendment now prayed is, of an intire ſentence: And it is alſo of ſuch a nature, that the finding of the jury will be altered thereby; for as the words now are, the damages are found upon the whole declaration, but the alteration prayed will make them relative to part of it only. And he cited 8 *Co.* 162. *b.* *Gouldſ.* 151.

To this it was replied by ſerjeant *Draper*, that this is plainly the miſtake of the clerk; and the amendment will not in the leaſt affect the finding of the jury, they having found leſs damages than the defendant's confeſſion. And he cited and relied upon the caſe of *Hughes* and *Alvarez*; (*a*) which was an action on the caſe upon ſeveral promiſes; and it was awarded that the plaintiff do recover his damages, and the jury were directed to enquire what damages he had ſuſtained "by reaſon of the premiſſes." After execution of the writ of inquiry, it was moved to amend it, by inſerting the words, "by reaſon of his not performing the promiſe firſt herein before mentioned," inſtead of the other words, "by reaſon of the premiſſes;" and in ſup-

(*a*) Stra. 684.

port

clerk. This caſe and that of *Hughes* and *Alvarez*, and both in point. The alteration moved for in the preſent caſe is conformable to the confeſſion of the party, againſt which the jury cannot find. As to coſts, this is certainly an amendment by ſtatute, but I do not know whether it be a rule ſtrictly adhered to, that the court will not give coſts, becauſe theſe are not given by the act. In *Hughes* and *Alvarez*, coſts might not be inſiſted upon; and in *Baker* and *Cambell*, the amendment was granted on payment of coſts.

The court deſired time to conſider this point; whereupon ſerjeant *Draper* gave it up: And the rule for the amendment (*per totam curiam*) was made abſolute, on payment of coſts.

* P 80 **Tedloe* againſt *Dickenſon and ethers.*

What are hackney coaches within 9 *Ann.* ch. 23.

CASE for money had and received to the plaintiff's uſe: And upon the trial (which was before lord *Hardwicke* then C. J. of this court) the plaintiff obtained a verdict, ſubject to the opinion of the court; and a caſe was directed to be made by conſent, which was thus:

The plaintiff being licenſed to keep an hackney coach, and having and uſing an hackney coach licenſed for ſtanding and plying in the ſtreets, and having other coaches and horſes not uſed for ſtanding and plying in the ſtreets, but for accommodating perſons on particular contracts, he let to hire one of the laſt mentioned coaches to *A. B.* for carrying

ing him from place to place within the bills of mortality for one day without a figure: And for this he was convicted by the commiſſioners for licenſing hackney coaches, and the money, for which this action is brought, was levied by the defendants under the conviction.

The ſingle queſtion hereupon was, whether the coach let to *A. B.* as aforeſaid, be ſuch an one as falls within the ſtatute of 9 *Ann. c.* 23.

And after argument by Mr. *Bootle* for the plaintiff, and Sir *Thomas Abney* for the defendants, the court were clearly of opinion, (1) That this caſe falls within the general view and aim of the ſaid act, which is principally to be regarded, (as appears by *Salk.* 612.) and it is alſo within the words thereof; for an hackney coach within this ſtatute is one let for hire within the bills of mortality; and here the coach was let for a time, for which a particular rate is fixed by the act. (2) That the ſtatute of 1 *Geo.* 1. *c.* 57. extends only to coaches attending upon funerals: And ſo *Lee*, C. J. ſaid it was determined in *The King* and *Betts*, (*a*) *Trin.* 13 *Geo.* 1. and therefore this act does not affect the preſent caſe.

(*a*) 2 Lord. Raym. 1506.

*The verdict was therefore now ſet aſide; and the court refuſed to hear the caſe further argued, though warmly preſſed by the plaintiff's counſel. * P 81

Quære: Whether this was a proper form of action to try this queſtion; and ſee *Linden* v. *Hooper*, Cowp. 414. *Feltham* v. *Terry*, cited Cowp. 419. 1 *Term. Rep.* B. R. 387. Buller's N. P. 131.

The King againſt *Bryan.*

In convictions, the evidence ought to be ſet out. Otherwiſe of orders. An order muſt ſhew a juriſdiction in the perſon making it, but a licence to keep an alehouſe, need not ſet out that the juſtices granting it live within the diviſion, nor any other of the circumſtances required by the act. V. Caldecot. 304. n.

CONVICTION for keeping an alehouſe without licence: And the conviction ſet out, that 28 *Auguſt*——— at *Taunton*, *&c.* one *W. S.* informed, *&c.* two of the juſtices within the ſaid borough, that defendant did keep an alehouſe within the ſaid borough without being thereunto licenſed; whereupon the defendant being ſummoned, *&c.* he was aſked if he could ſay any thing why he ſhould not be convicted, and he confeſſed that he kept an alehouſe, and had no other licence than the following, *viz.* "The hundred of *Taunton*. We two of his "Majeſty's juſtices of the peace for the county of "*Somerſet*, *&c.* do licence *Thomas Bryan* to keep an "alehouſe for one year and until the next general "licenſing, *&c.*" And the conviction further ſet out, that the ſaid licence having been read, thereupon the ſame licence appearing not to have been granted at a general quarter-ſeſſions, nor according to any method in this borough at any time heretofore, uſed it is adjudged that *T. B.* be convicted, *&c.*

It was firſt moved by Mr. *Sanſom* in *Hilary* term laſt to quaſh this conviction: And the caſe was ſtirred again by ſerjeant *Huſſey* laſt *Michaelmas* term, but adjourned for further argument.

And it was now objected by ſerjeant *Burnet* to the conviction, (1) That it appears the juſtices have proceeded upon other evidence than what is ſet out in

in the conviction; for it is ſaid in the conviction, that the licence was not granted at a general quarter-ſeſſions, nor according to any method in the ſaid borough at any time before uſed; whereas nothing of this kind appears in or can be collected *from the licence, which is the only evidence ſet out. And in convictions, which are in the nature of judgments, the whole evidence muſt be ſhewn, that this court may judge of the ſufficiency thereof; but otherwiſe it is in orders, which are authoritative: And ſo it was laid down in the caſe of *The King* and *Floyd, Mich.* 8 *Geo.* 2. * (2) Suppoſing that the juſtices have gone only on the licence, this does not warrant what is ſet out in the conviction, as is before mentioned. (3) The licence ſet out is a good one, or at leaſt ſufficient to exempt the defendant from the penalty of the act: For (1) It being mentioned to extend "until the next general licenſing," theſe words ſhew, that this was granted at a general licenſing; as required by the 2 *Geo.* 2. *c.* 28. *ſect.* 11. (2) In this licence it is not neceſſary to ſhew that it was granted at a general meeting, for the act of *Geo.* 2. gives no new juriſdiction, but is merely directory: And the granting of theſe licences is purely diſcretionary, and a *mandamus* to compel juſtices to licence hath been, for this reaſon, refuſed. In the precedents of licences, none of the requiſites neceſſary to give a juriſdiction are ſet out; and ſo in licences granted to recuſants upon the

* P 82

* *The King* and *Floyd, Mich.* 8 *Geo.* 2. Motion to quaſh an order of ſeſſions (made under the ſtatute of 1 *W. & M. c.* 21. *ſect.* 6.) whereby the defendant is adjudged guilty "upon full proof" of the charge againſt him, and that he be diſcharged from his office of clerk of the peace, upon the objection that the evidence is not ſet out: But adjudged after conſideration, that this was an order, and therefore the evidence need not be ſhewn; but that it would be otherwiſe if it was a conviction. (*A.*) *Rex* v. *Lloyd.* 2 Stra. 996. S. C.—See *Rex* v. *Biſſex.* Say. 304. S. P.

ſtatutes of 35 *Eliz. c.* 2. *ſect.* 12. and 3 *Jac.* 1. *c.* 5. *ſect.* 7. it is ſufficient to ſay, "with the aſſent "of the biſhop," or "lieutenant," without adding "in writing and under hand and ſeal," though this be required by theſe acts; but it ſhall be intended. *Dalton's Juſtice, ch.* 177. (3) Suppoſing this licence not granted according to the act, yet it is not void as to the defendant, ſo as to ſubject him to the penalty for acting under it. The word [void] in ſtatutes, is often conſtrued to mean "voidable" only, eſpecially when relating to judicial acts. 2 *Salk.* 674. *pl.* 1, 2. And ſo in an action upon an uſurious bond, the defendant cannot plead *non eſt factum*, tho' the ſtatute ſaith, that ſuch bonds, *&c.* ſhall be void. *And, which ſeems ſimilar to this caſe, where an inferior court hath cognizance of the cauſe and of the proceſs, and it iſſues an erroneous proceſs, yet the proper officer acting under it is juſtifiable.

5 Co. 119. a. b.

* P 83

6 Co. 54. a. Dy. 61. pl. 26.

It was anſwered by ſerjeant *Eyre* to the firſt and ſecond objections, that it is not neceſſary in convictions to ſet out the whole evidence; but if there be enough ſhewn to let this court ſee that it is ſufficient to warrant the charge, it is ſufficient. This is the preſent caſe; for the fact which the defendant was charged with is, his keeping an alehouſe without licence: He confeſſes the keeping an alehouſe, and produces a licence, which himſelf ought to have ſhewn to be a regular one. This was his own defect; and it was not neceſſary to ſay in the conviction negatively, neither is it ſo expreſſed, that it appeared the licence "was not granted" at a general meeting; and therefore the words of the conviction are very proper, that "it appearing not to have been granted," *&c.* which convey a meaning very different from the other expreſſion. As to what is added in the conviction, *viz.* "That it

"was

"was not granted according to the uſage," &c. this is quite immaterial, becauſe there is no other method of granting licences than that preſcribed by the ſtatute. Thirdly, It was anſwered, that by the expreſs words of the ſtatute, the licence is abſolutely "null and void." There is no appeal, nor any other way of vacating this licence than by declaring it to be void; and therefore the word cannot be conſtrued as "voidable" only; as in the caſes mentioned, where the act might be avoided by another method.

To this laſt point it was replied, that the juſtices might have ſuperſeded the licence if it be not a good one; but they ought not to puniſh the defendant by way of penalty, as he was no judge of its validity.

Lee C. J. In convictions the evidence ought always to be ſet out; and ſo it has been determined in many caſes, *even where the words were "fully and duly appeared;" as in the caſe of *The King* and *Theed.* (a) * If therefore here it had been ſaid, "that it appeared," or "that it duly appeared," it would not have been ſufficient. In this caſe it muſt be taken that the licence was the only evidence which the juſtices went upon, for to this the word "appearing" is referred, as is plain by the word "thereupon" in the beginning of the ſentence. Now I am of opinion, that this alone is not ſufficient to ſhew that the defendant acted without a licence granted at a general meeting: For in licences it is not neceſſary to ſet out, that the juſtices live within the diviſion, or any other of the circumſtances required by the act; and ſo are the precedents of theſe licences in the books, and the caſe menti-

* P 84.

(a) 2 Stra. 919. 2 Barnard. B. R. 16. 73. infra.

* *King* and *Theed. Mich.* 4 *Geo.* 2. Conviction by two juſtices upon the exciſe act of 11 *Geo.* 1. *c.* 30. quaſhed, becauſe the evidence was not ſet out; and the court held, that if it was to be conſidered as an order only, this would be no good objection. (*A*)

oned

oned of recuſancy in *Dalton's Juſtice*, is ſimilar to the preſent. In orders it is indeed neceſſary to ſhew a juriſdiction, becauſe theſe are judicial acts; but a licence for keeping an alehouſe is purely diſcretionary, and no appeal is given in this caſe; but if the licence be granted by juſtices out of the diviſion, or otherwiſe in an improper manner, the alehouſe may be ſuppreſſed. I do not ſay, that all the evidence ought to be ſhewn, but certainly ſo much ought to be ſet out as is ſufficient to warrant the conviction. I was of the ſame opinion before, that this is a fatal objection, and upon conſideration, am confirmed in it. As to the point, whether a perſon acting under a bad licence incurs the penalty, where the licence plainly appears to have been granted contrary to the act, it may perhaps be too much to ſay, that it ought not to be conſidered as abſolutely void as to the party, as this is a particular kind of juriſdiction, and the words of the act are "null and void": But this is not the preſent queſtion.

By *Page* juſt. If a licence is granted improperly, as by juſtices living out of the diviſion, it is not void as to the perſon acting under it, who probably does
* P 85 not know the *exact bounds of the diviſion. And *Probyn* juſt. ſaid, that if this point was now in queſtion, it would deſerve conſideration, whether the juſtices can puniſh a man by this ſtatute, who acts under a viſible authority. He alſo objected, that it is mentioned in this conviction that the licence was not granted according to the uſage of the borough; and if ſome of the reaſons ſet out are good, and others not, the conviction is ill, becauſe we do not know

know upon which the juſtices proceeded: And here it is plain they went upon both.

By the whole court, the conviction was quaſhed upon the firſt objection.

See Rex v. *Vipont.* 2 Bur. 1163.—*Rex* v. *Thompſon* 2 Term. Rep. B. R. 18. *Rex.* v. *Read.* Doug. 469. *Rex.* v. *Killet* 4 Bur. 2063.

S. C. not S. P. 2 Stra. 1051.—4. Bro. P. C. 271. Cas. T. Hardw. 147. 295. 377. poſt. 104. 171. 320.

Kynaſton againſt *the mayor, aldermen and aſſiſtants of Shrewsbury.*

A *Mandamus* was granted in *Eaſter* term, 6 *Geo.* 2. to reſtore the plaintiff *Kynaſton* to the office of one of the aldermen of the town of *Shrewsbury*, from which he had been amoved: And a ſpecial return having been made to the writ, and ſeveral iſſues taken to the return, the cauſe was tried at the *Lent* aſſizes, 7 *Geo.* 2. by a ſpecial jury, who found a ſpecial verdict; and upon this verdict the court were of opinion, that the plaintiff was unduly amoved: But no damages having been given by the jury, and the court holding, that this omiſſion could not be ſupplied by a writ of inquiry, a writ of error was brought in the houſe of lords; and they reverſed the judgment for this cauſe, and remitted the record, and directed this court to award a *venire facias de novo*; which was accordingly done. But when the cauſe was brought on for trial, for which a ſpecial jury was returned, the defendant took a challenge to the array of the panel, *viz.* That *John Powell*, the ſheriff of the county of *Salop*, by whom the

Whether on iſſues taken on the return of a *mandamus* to reſtore the plaintiff to the office of Alderman of S. it be a good cauſe of challenge to the array, on the part of defendant, that the Sheriff who returned the Jury was one of the Aldermen of S.

the return was made, " was one of the aldermen of " *Shrewsbury*, and concerned in intereſt in the event " of the cauſe." To *this the plaintiff *inſtanter* de-
* P 86 murred: and the defendants joined in demurrer: And the judge of aſſize adjourned the matter *propter difficultatem.*

This caſe was argued laſt term by ſolicitor general *Strange* for the plaintiff, and Mr. *Hollings* for the defendants; and this term by Mr. *Willbraham* for the plaintiff, and ſerjeant *Parker* for the defendants.

It was admitted by the plaintiff's counſel, that ſome challenges may be taken both by the plaintiff and the defendant; as a challenge *propter defectum*, or *delictum*, for want of hundredors, where the jury is returned by a wrong perſon; and in the caſe of a peer, where no knight is returned: For in theſe caſes the objection is as reaſonable in the mouth of the one party as of the other; and particularly in the laſt, the objection is ſtronger on the ſide of the commoner than of the peer, as ordinary people are apt to be overawed and influenced where a peer is party; whereas the challenge is given to the peer *propter dignitatem* only. But it was urged for the plaintiff, that a challenge *propter affectum* can only be made by the party to whom the ſheriff or juror is not related, it being quite irrational that a perſon ſhould challenge either of them, becauſe he is biaſſed in favour of himſelf: And this is the firſt inſtance of ſuch a challenge. In the caſe of aſſigning errors, which ſeems ſimilar to the preſent, the rule is, that a party cannot aſſign any thing for error which is for his own advantage. *F. N. B.* 21. F. 1 *Roll.* tit. *Error.* 1 *Vent.* 316. 1 *Roll.* 760. S. C. 2 *Saund.* 45. And ſo in the caſe of evidence, where a witneſs is produced who is related to one of the parties, or intereſted in the cauſe, he may be admitted to give his evidence, if the

the other party will conſent to it; for every perſon may renounce his right, or any law *pro ſe introducto.* It is alſo material that the ſheriff hath very little to do in the caſe of ſpecial juries, though it muſt be admitted that the late act makes no difference in challenges. And beſides, if theſe challenges are allowed, it will tend greatly to the delay of *juſtice; eſpecially in the caſe of corporations, where perſons may privately be made ſheriffs for the purpoſe made uſe of here: And it is to guard againſt this inconvenience that the plaintiff may in ſome caſes pray proceſs to the coroners. *Co. Lit.* 157. *b.* On this ſide were cited *Cro Jac.* 551. *Dyer* 319. *a.* [In which laſt caſe it was doubted, if the plaintiff could challenge the array for affinity between the ſheriff and defendant, when the cauſe is carried down by proviſo; which, it was ſaid, would never have been made a queſtion if the challenge were good on the other ſide.] *The King* and *Burridge*, 2 *Ld. Raym.* 1364. Stra. 593. S. C.

* P 87

On the other ſide it was argued, that the end of every trial is, that the truth of the fact which is put in iſſue may appear, that ſo juſtice may be done to both parties; and therefore it is unreaſonable that any perſon related to either of them, or concerned in intereſt ſhould be upon the jury, and ſo the *venire* expreſly directs; much more that he ſhould return it, whether this be diſcloſed by the plaintiff or the defendant. The oath of a tryer accordingly is in general terms, *viz.* "That he ſhall well and truly "try whether *A. B.* [the juror challenged] ſtands "indifferent between the parties to this iſſue." *Salk.* 152. Now in this caſe the tryers muſt have found, if the matter had been diſputed, that the ſheriff is intereſted in the event of the cauſe; and this is now confeſſed by the demurrer. Challenges being for the ſake

v. *Hoſketh* v. *Braddock* 3. Bur. 1847.

ſake of juſtice, they are greatly favoured in the law. *Co. Lit.* 158. *a.* 3 *Keb.* 740. Therefore in challenges it is not neceſſary to ſet out how near the ſheriff or juror is related; but if it be ſhewn in general that he is related, it is ſufficient. 19 *H.* 8. *pl.* 6. So if a challenge is once made, the court will not ſuffer the party to withdraw it. If there be two defendants, and one of them challenges, and the other will not, the juror ſhall not be ſworn for either of them. *Jenk.* 114. *Moor* 13. And for the ſame reaſon they are mutual, as in the caſes admitted, for want of hundredors, and for want of a knight in the caſe of a peer. 1 *And.* 272. 2 *Show.* 423. So
* P 88 where a ſpecial jury is returned * by a wrong perſon, though it is ſtruck by both parties, yet either may challenge the whole. So if the ſheriff be related to both parties alike, either of them may challenge him; and yet in ſuch caſe it cannot reaſonably be ſuppoſed that he is more biaſſed in favour of one than of the other. *Cro. El.* 23. And, which comes up to the preſent caſe, if the ſheriff be nearer related to one than to the other, the party to whom he is neareſt of kin may challenge him. *Co. Lit.* 157. *a.* And if a juror has declared his opinion in favour of one of the parties, the ſame party may challenge him. It is alſo material, that on the plaintiff's ſide he may ſuggeſt affinity between himſelf and the ſheriff, and pray a writ to the coroners, and may alſo object to a *venire facias* directed to the ſheriff, though of his own ſuing, where it ſhould have been to the coroners; and yet the defendant perhaps would not have objected to the ſheriff: And by parity of reaſon, the defendant ought to have the liberty of challenging in the like caſe. It makes no difference that this is the caſe of a ſpecial jury, it having been determined in

in *The King* againg *George and Johnſon*†, that the late act does not affect challenges. It was alſo objected by the defendant's counſel, that upon this challenge the ſheriff may be conſidered as intereſted on the ſide of the plaintiff; for it is in general terms, that "the ſheriff is concerned in intereſt in the event "of this cauſe." But the argument ſingly relied on by ſerjeant *Parker* was, that this matter is aſſignable for error by the plaintiff; and therefore as the finding of the jury may be rendered ineffectual by him, the defendant ought to be allowed his challenge, in order to prevent a vain and fruitleſs inquiry. Now that an act of the court in miſawarding proceſs may be aſſigned for error, is plain by *Moor* 356. *Cro. Jac.* 551, 547. 1 *Roll.* 799, 800, 801. 2 *Saund.* 257. 258. So where one of the parties is judge. *Co. Lit.* 141. *a.* And a matter of challenge may alſo be aſſigned for error; as appears by 12 *H.* 4. 24. 1 *Roll.* 783. *pl.* 14, 760. *pl.* 8. *Cro. El.* 188. 850. And to this point he alſo cited the two following caſes: *Acres* and *Lord Peterborough*, *Trin.* ——— in the Exchequer. *Error of a* *judgment in the Exchequer of *pleas*: And the error aſſigned was, that there was not a knight returned on the panel; and diſallowed for this reaſon only, becauſe it was not matter of challenge. *Holbourne* and *Babington*, (*a*) in the houſe of lords, *January* 25, 1719. upon an appeal from *Ireland*. Ejectment on the demiſe of a peer; and the queſtion was, whether the defendant, who was a commoner, might challenge the jury at the aſſizes, becauſe there was no knight returned. The judges were ordered to attend: And lord *King* cited a caſe in lord *Holt*'s time, in which lord *Holt* was of opinion, that where no knight is returned in the caſe of a peer, either the peer or the commoner may challenge; (1) Becauſe the having a knight is for the

† 2 Sera. 1000. S. C. The ſtatute for ſpecial juries does not affect challenges.

* P 89

(a) 2 Bro. P. C. 114.

ſecurity

ſecurity of the commoner as well as for the ſake of the peer. (2) Becauſe if there ſhould be a verdict for the commoner, who was the defendant, the peer might aſſign this for error; and it is reaſonable to prevent the defendant from being turned round. But in the principal caſe it was held, that the commoner could not make the challenge, becauſe the peer was neither plaintiff nor defendant. It therefore inſiſted in the preſent caſe, that the inconvenience of diſallowing this challenge will be much greater than what will follow from the allowing it; for if it be allowed, the plaintiff may pray a writ to the coroners: And if there has been any delay, it is his own fault in not praying it ſooner. And as to the caſe of error, to which this caſe has been likened on the other ſide, it was anſwered, that the ſuing of the *venire* to the ſheriff is the act of the court, and therefore it may be aſſigned for error by the defendant though it be for his own advantage.

It was replied, amongſt other things, that the matter, which is the ground of the challenge, cannot be aſſigned for error, either by the plaintiff or defendant, becauſe it doth not appear on the face of the record: Neither if the record be affirmed, will this appear on record. 1 *Brown.* 196. But ſuppoſing that the plaintiff may aſſign it for error, the defendant cannot do it, becauſe he muſt take * advantage hereof below, if he can do it at all. So formerly, in the caſe of a peer, where no knight is returned, the commoner could not aſſign it for error. 1 *Roll.* 760. *pl.* 8. And though perhaps this may now be aſſigned for error by both the parties, yet it is not like the preſent caſe, becauſe there it appears upon the record, by the title and ſtyle, that one of the parties is a peer; but here it is otherwiſe. Beſides,

* P 90

errors

errors cannot be aſſigned in proceſs or delay where it is for the party's advantage. *Beecher's* caſe, 8 *Co.* 59. *a.* The *Year book*, 12 *H.* 4. 24. cited on the other ſide, is contrary to *Cro. Jac.* 29. And there is no caſe to be found in any of the books, where ſuch matters were aſſigned for error; which certainly there would be, if they could be taken advantage of in that way. It is ſaid, that the plaintiff, on ſuggeſtion of affinity between him and the ſheriff, may pray proceſs to the coroners. *Anſw.* This is only to prevent delay on the trial; and ſo it appears by the books cited *contra.* Objected further, that upon the preſent challenge the ſheriff may be taken to be in the intereſt of the plaintiff. *Anſw.* It is ſaid in the challenge, "that he is an alderman," which the defendants alſo are; and this muſt be conſidered as the ſole reaſon of his being intereſted. [Which the court granted: And by *Page* and *Chapple* juſt. the latter words in the challenge are not material, and if they had been alone, the challenge, for want of a cauſe ſhewn, muſt have been over-ruled upon demurrer; which is a confeſſion only of things well pleaded.]

The whole court ſeemed to be of opinion, that if the matter, which is the ground of this challenge, can be aſſigned for error by the plaintiff, the challenge is good, in order to prevent circuity; but as to this point they differed. *Lee* C. J. inclined to think, that it cannot be aſſigned for error by the plaintiff; though he admitted, that where one of the parties is judge, this may be aſſigned for error, and ſo it was held in *The city of London* and *Wood.* (*b*) But he ſeemed more clear in thinking, (in which *Page* juſt. concurred) that the defendant cannot aſſign this matter *for error, becauſe it is for his own benefit; and alſo becauſe he may take advantage thereof,

(*b*) 12 Mod. 669. 1 Salk. 397. 1 Bro. P. C. 217. V. Stra. 639. 640.

thereof, if by law he is intitled to it, on the trial by challenge; which C. J. ſaid, is his only method. And both he and *Page* juſt. inclined in favour of the plaintiff, on account of the great delays which would attend the allowing of theſe challenges: And the C. J. cited 3 *H.* 7. 5. *Jenk.* 115. But he ſaid, this was a new and difficult point, and deſerved great conſideration. On the other ſide *Probyn* and *Chapple* juſt. ſeemed to think, that the plaintiff may aſſign this matter for error, becauſe if it be a good objection, the trial will be an undue one.

But the court delivered no opinion, and took time to adviſe. (*Poſt.* 104.)

Boſworth

Bosworth (chamberlain of London) againſt *Hearne*.

S.C. 2 Stra. 1085. Cas. T. Hardw. 405.

AN *habeas corpus* was brought, directed to the mayor, aldermen and ſheriffs of *London*, for removing the body of one *Hearne*: To which they returned, that *London* is an antient city, and that by cuſtom immemorial the mayor and aldermen thereof have a right of having the overſight of all brewers carts and drays uſed in the city for preventing all annoyances and nuiſances in the ſtreets of the ſaid city; and that here is another immemorial cuſtom in the ſaid city, that if any of the cuſtoms thereof be in any part difficult or defective, or any thing ſhall ariſe therein before unprovided for which ſhall require any remedy, the mayor, aldermen and commonalty, may at any time or times make ſuch orders as they ſhall think proper, ſo that the ſame be not prejudicial to the King or his people, or repugnant to the laws of the realm: That all the cuſtoms of the ſaid city are confirmed by parliament; and that *anno* 1663. an order was made by the mayor, aldermen and commonalty reciting, that the * ſtreets of the ſaid city were much annoyed by brewers carts and drays, and therefore it was ordained thereby, that no brewer, drayman or brewers ſervants, ſhall work or be abroad in the ſtreets with any cart or dray from *Michaelmas* to *Lady-day* after one of the clock in the afternoon, or from *Lady-day* to *Michaelmas* after eleven in the morning, upon the pain of forfeiting 20*s*. for every time, *&c.* to be recovered by action of debt, bill or plaint,

A By-law (grounded on a cuſtom) that no brewer, drayman, or brewer's ſervant ſhall work or be abroad in the ſtreets with any cart or dray from *Michaelmas* to *Lady-day*, after one o'clock in the afternoon; or, from *Lady-day* to *Michaelmas*, after eleven in the morning, upon the pain of forfeiting 20*s*. held good.

* P 93

plaint, to be brought and profecuted in the name of the chamberlain of the ſaid city in his Majeſty's court of the *Guildhall* there, wherein no eſſoin or wager of law ſhall be allowed; and then the return ſets out, that before the ſaid writ *Hearne* was taken and detained by virtue of an original bill in a plea of debt on the demand of 20*s.* in the mayor's court at the ſuit of the chamberlain, for that he the ſaid *Hearne* was abroad with his dray, *viz.* in *Thames-ſtreet*, between *Michaelmas* and *Lady-day*, after one in the afternoon, *&c.*

The queſtions in this caſe were, (1) Whether this be in itſelf a good by-law. (2) Whether it be void, as being contrary to the ſtatute of 15 *Car.* 2. *cap.* 11. which enacts, (*ſect.* 11.) that "no brewer "ſhall deliver any beer, *&c.* in any city, *&c.* be- "fore notice given to an officer of exciſe, but be- "tween the hours of the day hereafter mentioned, "*viz.* from *Lady-day* to *Michaelmas* between three "in the morning and nine in the evening, and from "*Michaelmas* to *Lady-day* between five in the morn- "ing and ſeven in the evening."

And the caſe was argued laſt *Hilary* term by ſerjeant *Bootle* for the defendant, and Mr. *Garrard* (the common ſerjeant of *London*) for the city; and laſt *Eaſter* term by ſerjeant *Eyre* for the defendant, and ſerjeant *Chapple* (ſince made one of the juſtices of this court) for the city: And it was this term argued by Mr. *Strange* (ſolicitor general) for the defendant, and by Mr. *Noel* for the city.

It was urged for the defendant, that this by-law is in itſelf unreaſonable, and therefore void though
* P 92 grounded *on a cuſtom; (1) Becauſe it introduces too great a reſtraint upon trade. For by the common law, all perſons had the whole day to work in; but

be impoſſible to ſupply all the people with drink, eſpecially in winter, which is the principal time for brewing, by reaſon of the ſhortneſs of the time allowed; and conſequently many of them will be obliged to brew at *home: And the duty payable by publick brewers is much higher than what is payable by private perſons. There muſt be alſo an increaſe of exciſe officers, as there muſt be an officer in every houſe about the ſame time; and this will be a great addition to the expence of the King in collecting this duty. (4) To all the people in general this by-law is detrimental in many reſpects. It occaſions a greater expence to the brewer than uſual, by neceſſitating him to keep a greater number of ſervants and carts and horſes; and therefore he muſt either raiſe the price of beer, or lower the quality of it. And the conſumer will be alſo obliged to keep his houſe open in the night-time, eſpecially in winter, to receive drink. Beſides, as perſons muſt brew more at home, for the reaſons before mentioned, the city will be as much annoyed by the ſtench, as if the brewers themſelves kept on their trades in it; which is unlawful for that reaſon. *March* 15. And the very end of the by-law will be ſubverted by the regulation made thereby; for the tying down brewers and draymen to ſo ſhort a time tends to increaſe the ſtoppages in the ſtreets, and for thoſe hours will make them almoſt impaſſable for other people. (5) The by-law is too extenſive; for it comprehends not only draymen who drive for hire, but alſo drivers, who are as much the ſervants of brewers as other tradeſmens ſervants; and it is unreaſonable to reſtrain tradeſmen from delivering their goods by their own proper ſervants. It reaches alſo to all perſons whatſoever who are carrying home their own beer. Suppoſing it therefore a good by-law as to drivers for hire,

*P 94

hire, yet as to all others it is certainly ill. 1 *Keb.* 463, 496. 3 *Keb.* 10. S. C. 1 *Vent.* 195. *Raym.* 288, 324. Upon the whole therefore this by-law is unreaſonable: And to this point the following books were alſo cited, *viz.* *Waggoner's* caſe, 8 *Co.* 121. *b.* 4 *Inſt.* 249. *Moor* 411.

To the ſecond point it was argued for the defendant, that this by-law is void, as it is inconſiſtent with the ſtatute of 15 *Car.* 2. *cap.* 11. *ſect.* 11. By this act the time allowed by the common law is greatly reſtrained; and *ſurely the intent thereof was, to leave brewers in the quiet poſſeſſion of the remaining part of the day: But even this is much narrowed by the preſent by-law, which was made ſoon after the act, and may be looked on as an attempt towards the repeal of it. It is alſo inconſiſtent with the ſtatute, as it tends to ſubvert, for the reaſons before urged, the grounds mentioned in the preamble for the making it, *viz.* the ſupport of the publick revenue, and the eaſe of the people. To this point were cited 11 *Co.* 63. 2 *Bulſ.* 187. S. C. 1 *Ro.* 10. 7 *H.* 6. *pl.* 1. The defendant's counſel did alſo warmly inveigh againſt the pompous manner in which this by-law is penned, as it reſembles the ſtyle of the acts of the legiſlature: And *Godb.* 107. was cited to this purpoſe. * P 95

On the other ſide it was argued, (1) That this by-law in itſelf is a very fit and proper regulation of trade; for where any trade is detrimental to the public, either by reaſon of its nature, or its excreſcence, it may be reſtrained by a by-law, eſpecially when founded on a cuſtom: Though ſuch by-laws muſt neceſſarily be to the prejudice of thoſe particular perſons whoſe trade is thereby reſtrained, and who create the grievance which is thereby remedied. Now the grievance attempted to be guarded againſt by this by-law is, the annoyance occaſioned by carts and drays being in the ſtreets, whereby the

general commerce of the city was much retarded: And this certainly ought to be taken care of, though it be to the detriment of a particular buſineſs. The only ways to prevent this annoyance are, either by reſtraining the number of carts and drays, or the time for uſing them; and both theſe methods are liable to the ſame objections: And yet the firſt has been already allowed. *Player* and *Jenkins*, 1 *Sid.* 284. In the preſent caſe, the time is reſtrained; but the hours ſtill allowed are the moſt proper for carrying on this buſineſs in, being the hotteſt part of the day, and when the ſtreets are leaſt crowded: And it is here returned by thoſe who are the beſt judges, that eight hours in the day, which is the
* P. 95 time here allowed, (as ſhall be hereafter mentioned)* are ſufficient for carrying on this buſineſs in: And the ſervants and horſes cannot be ſuppoſed to be able to work for a longer time in ſo laborious an exerciſe. It is alſo material, that though the ſtreets are now broader than formerly, the city is much more populous. And what makes the caſe ſtill ſtronger is, that this ordinance is founded upon cuſtoms which are confirmed by divers acts of parliament: And for this reaſon, in *Waggoner's* caſe, 8 *Co.* 126. *a.* many cuſtoms more unreaſonable than the preſent are allowed to be good. And to prove this by-law to be good, conſidered as a reſtraint of trade, were cited 1 *Roll.* 365. *pl.* 8. S. C. 5 *Co.* 62. *b.* 1 *Roll.* 365. *pl.* 9. *Palm.* 395. S. C. *Hard.* 56. *Player* and *Jenkins*, 1 *Sid.* 283. S. C. 2 *Keb.* 27. 1 *Lev.* 229. [In which laſt caſe ſuch a by-law is held good, even without a cuſtom.] (2) It was argued, that though caſes of neceſſity are not expreſly excepted, (it being impoſſible to provide for all ſuch caſes) yet theſe are excepted by implication: And it is not to be ſuppoſed that any perſon will be puniſhed for the breach

of

of a law, where it was impoſſible, in the nature of things, to comply with it. (3) With reſpect to the crown; it is a mere poſſibility, that the revenue will ſuffer by this by-law: But on the other ſide, there is a certainty of advantage reſulting to the King, by promoting the peace and commerce of his ſubjects. In the caſe of taverns and alehouſes, the city has the power of reſtraining the number thereof, (1 *Sid.* 284.) and yet there the ſame objection holds good, that the revenue may be decreaſed. (4) The by-law, as here ſet out, is to be underſtood, by a reaſonable conſtruction, of common brewers; and not of other perſons who brew for their own uſe, (as has been objected) for in returns there is not ſo much certainty required as in pleading. 1 *Keb.* 463, 496. As to the ſtatute of *Car.* 2. this was not made for the ſake of the brewers; and therefore it leaves them ſubject to the laws of the city, all one as they were before: But it was made for preventing of frauds committed by them in carrying out their beer at improper times; and therefore the by-law is not only conſiſtent *with, but in furtherance of the remedy provided by that ſtatute, as it reſtrains the time mentioned therein. The act is not in the affirmative, that the brewers may work from ſuch a time to ſuch a time; but it is in the negative, that they ſhall not work but within ſuch hours; like the ſtatute of 5 *El.* c. 4. (*ſect.* 31.) which being in the negative, leaves ſuch perſons as ſhall ſerve a proper apprenticeſhip ſtill ſubject to regulations by by-laws. Beſides, the only thing required by the act is, that notice be given to an officer of exciſe, if drink is carried out at a different time from what is mentioned therein. And it is obſervable, that by the by-law the brewers are ordered to leave off in the ſummer by eleven, and by the ſtatute they are allowed to go out at three; and

* P 97

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in winter they may go out at five by the ſtatute, and muſt leave off at one, by the by-law: So that in both caſes eight hours are allowed; which, as before is mentioned, is a reaſonable time. As to the ſtile of this ordinance, it was ſaid, that the common council has a power and juriſdiction over all the members of the city, and it much reſembles the high court of parliament. 4 *Inſt.* 249. And much was ſaid in honour of the city of *London*, as that it is the epitome of the whole kingdom, *&c.* 4 *Inſt.* 247.

Lee C. J. The ſtatute of *Car.* 2. has no influence on the preſent caſe, that being made for a particular purpoſe: and ſo much time as is thereby left to the brewers, remains ſubject to the ſame regulations as it was before the act. As to the by-law itſelf it is certain, that a by-law grounded on a cuſtom, and made for the regulation of trade, is good: For where there is a nuiſance ariſing from any buſineſs, it is proper to controul and remedy it by ſuch by-laws. But then it is alſo certain, that they ought to be reaſonable, and not prejudicial to the King or his crown. Where the nuiſance is the excreſcence of any trade, the perſons exerciſing it muſt neceſſarily be prejudiced by a regulation thereof; and ſo alſo may be the buyer: But the queſtion will be, whether on the whole the by-law is a reaſonable method for re-
* P 98 ſtraining the * nuiſance: And this muſt be determined from the general conveniency ariſing from the prevention of the nuiſance on the one ſide, and the inconveniencies on the other. In the preſent caſe it is impoſſible to ſay with certainty, without knowing exactly the number of brewers and draymen, and many other circumſtances, whether this by-law is reaſonable or not; but it does not appear that the time allowed by it is not reaſonable. *Obj.* That caſes of neceſſity are not excepted in this by-law. *Anſw.* In all laws ſuch caſes are implied,

implied, and neceſſity is a good excuſe for the breach thereof: And ſo it was ſaid by lord C. J. *Holt*, in the caſe of *The King* and *Vanacre*. And as to the objection, that it is not reaſonable that brewers ſhould be reſtrained in uſing their own drays; theſe, I think, are to be conſidered as drays for hire; as the conſideration for the carriage is included in the price of the beer. I am therefore of opinion, that this is a good by-law.

The reſt of the court (who argued *ſeriatim*) were unanimouſly of the ſame opinion, *viz.* (1) That this is in itſelf a good by-law, as nothing appears on the face of it to be unreaſonable; but on the contrary, though it is to the prejudice of a particular trade, yet it ſeems to be for the advantage of the publick in general: And for this reaſon other ordinances of the ſame kind have been held to be valid, as by-laws excluding tallow-chandlers, brewers, *&c.* fro mparticular places. [And by *Chapple* juſt. this by-law muſt be underſtood only of common brewers and draymen driving for hire.] (2) It was held, that the ſtatute of *Car.* 2. and this by-law are not inconſiſtent, they being made with different views: And beſides, the time of working is reſtrained by the act, and this is further narrowed by the by-law; ſo that they are perfectly coincident.

The whole court therefore being clearly of opinion that this was a good by-law, and the caſe having been three times argued, though Mr. attorney general now attended to take notes in order to argue for the crown againſt the *by-law, (the revenue being apprehended to be affected thereby) yet a rule was now granted for a *procedendo*. * P 99

Note

ference between penal and other actions, this is in effect a reverſal of the 4, 5 *A. pro tanto.* It is not therefore now material from what neighbourhood the jury comes. And even before theſe acts, the court might have awarded a *venire de corpore comitatus*, where the viſne was in ſuch a place from whence a jury could not come. *2 *Roll.* 617. *pl.* 2. (3) This defect, if it be one, is cured by the ſtatute of 5 *G.* 1. *c.* 13. which is in general terms, "that the judg- "ment ſhall not be ſtayed or reverſed for any defect "or fault either in form or ſubſtance in any bill, "writ original or judicial, *&c.*" And before this act the miſaward of a *venire facias* was aided by the ſtatutes of jeofails, unleſs it was in the caſe of penal actions; and this (as before mentioned) is not one: And it is alſo of ſuch a nature as ought to be greatly favoured. P * 100

To this it was replied, (1) That the ſtatute for amending of the law expreſly excepts this very caſe; the act on which the preſent action is brought being certainly a penal one. (2) The jury-act only directs how returns ſhall be made, but it makes no difference in the award of a *venire facias.* (3) This is not a caſe within the 5 *G.* 1. becauſe here the proper method of trial is altered; and certainly it was not the intent of this act to warrant the trial of cauſes by an improper jury: As (for inſtance) the trial of a cauſe in one county by a jury out of another. But ſuppoſing the general words of the enacting clauſe to extend to this caſe, yet it falls within the reaſon of the proviſo therein; for though appeals, indictments, preſentments and informations only are there mentioned, yet theſe are put by way of example; and an action of *qui tam*, which is always conſidered as a criminal proſecution, is within the meaning thereof. As exceſſive gaming is now prohibited by act of parliament, it is certainly

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an offence or misdemeanor; and it was the intent of the legislature to except all offences, and not the particular manner of prosecuting them. And in the present case, the party might have brought an information or indictment as well as an action. *Tutchin*'s case, *State Trials, Vol.* 5.

State Trials, Edit. 1742. Vol. 5. p. 528.

But the whole court (*absente Lee* C. J.) were clearly of opinion, (1) That though the ballot act does not speak of the *venire*, yet such an one must be sent as the return thereby directed may correspond to and comply with: For it would be fruitless and
* P 101 absurd to direct the sheriff to *return the jury out of the neighbourhood, when by the act he is obliged to do it out of the county. And by the same reason, by virtue of this act, there cannot be a challenge for want of hundredors. (2) That this falls within the general words of 5 *G.* 1. and is not excepted thereby; for as the sheriff is obliged to return the jury out of the body of the county, the present objection goes to the writ only, and this now cannot be more than defective in point of form. And as for the exception, this extends only to criminal proceedings; (1) for the word [action] is not therein mentioned, and it cannot be included within any of the words there used. This case differs greatly from *Tutchin*'s case, an information and indictment being both of them a publick prosecution for an offence, and there being in each a fine to the crown; whereas this is only a private action. The present case therefore is very well on both these statutes. Motion therefore denied. (2)

See *Atcheson* v. *Everitt.* Cowp. 382.

(1) By 24 *G.* 2. *c.* 18. in informations as well as actions on penal statutes the *venire* is to be *de corpore comitatus.*

(2) *Frederick* v. *Lookup*, 4 Bur. 2018. S. P. on error. So in *Wynne* v. *Middleton* 1 *Wilf.* 125. in an action on 7 & 8. W. 3. *c.* 7. for a false return. See post. 115. *Merrick* v. *Offelstone.*

The

The King and *the inhabitants and occupiers of lands in the county of Middleſex.*

S. C. poſt. 285.

AN order was made by a ſeſſions, mentioned in the caption to be held 12 *January*, being *Monday* after the *Epiphany*, and continued by ſeveral adjournments to this day, reciting, that whereas a preſentment has been made, whereby it appears to us that a publick bridge called *Bentford* bridge in the county of *Middleſex* is very much out of repair, &c. and further reciting, that the ſaid bridge is within the pariſh of *H.* within the juriſdiction of this court; and that it ought to be and hath uſually been repaired by the inhabitants and occupiers of lands, &c. in the ſaid county, &c. and then a rate is made upon the ſeveral pariſhes, hamlets, towns and places in the ſaid county: And the churchwardens, overſeers and petty conſtables, are ordered to aſſeſs the inhabitants, &c.

An order of ſeſſions muſt ſhew the commencement, but need not ſhew the adjournments of the ſeſſions. "Whereas a preſentment has been made whereby it *appears*," &c. is a ſufficient ſtatement that it was ſo found. A general rate by the ſeſſions upon the ſeveral pariſhes, &c. with orders to the churchwardens, &c. to

*And it was moved laſt *Trinity* term by Mr. *Lloyd* to quaſh this order: And the caſe was then argued by him and ſerjeant *Parker* againſt the order, and by Sir *Thomas Abney* and Mr. *Marſh* in ſupport thereof: And this term it was again argued by the ſame counſel.

aſſeſs the inhabitants, is ſufficient under 1 *Ann. ſt.* 1. *c.* 18; for it is impracticable for the juſtices to tax particular perſons. It muſt be preſented that the bridge to be repaired was a publick bridge within the county, and out of repair, which muſt be ſhewn in the order: but it is not neceſſary that the jury ſhould preſent by whom the bridge ought to be repaired. See poſt. 285.

And

And it was objected to the order, (1) That every particular adjournment ought to have been ſet out, in order to ſhew that there was no diſcontinuance: For each adjournment conſtitutes a diſtinct court, and if either of the adjournments was made by a ſingle juſtice, it would be ill. And it is not to be intended that an inferior court has an authority, but this muſt be ſhewn. The adjournment is not from ſuch a day to ſuch a day, but in the lump; like the caſe in *Salk.* 605. *pl.* 2. (2) It is not ſufficiently ſhewn that there was any preſentment, for the order recites, "that whereas a preſentment has "been made, whereby it appears to us" ſo and ſo; whereas it ſhould have been ſaid [whereby it is found] thus and thus. *Salk.* 478. *pl.* 23. (3) If a preſentment be ſhewn, it is materially defective; it being only, that "a publick bridge, *&c.*" is out of repair: Whereas it was neceſſary for the juſtices, in order to give themſelves a juriſdiction, to ſhew a preſentment, that this was a county bridge, and to be repaired by the inhabitants, *&c.* thereof; but this the juſtices have themſelves determined. It is indeed called a publick bridge, but this means only ſuch a bridge as any one may paſs over, and which is of publick utility: And this perhaps may be repairable by a corporation, or a private perſon. The 22 *H.* 8. *c.* 5. does not indeed ſpeak of any preſentment; but lord *Coke* (in his comment thereon, 2 *Inſt.* 703.) ſays, that one is adviſable. And in the ſtatute of 1 *A. ſt.* 1. *c.* 18. (upon which this order is made, and which inforces that of *H.* 8. ſo far as it doth not repeal it) the words, "and which by "them hath uſually or ought to have been repaired," extend to the word "preſentment" before mentioned. By the ſtatute of 23 *H.* 8. *c.* 5. of ſewers (which was
* P 103 made *ſoon after the other relating to bridges) an inquiry

quiry by jury is required; and there is the ſame reaſon for a preſentment here as in that caſe: for it would be very inconvenient to allow to the juſtices an arbitrary power as to the point now under conſideration, becauſe they may tie down perſons who are not rateable, and who have no kind of remedy, whereas preſentments are traverſeable. *Carth.* 73, 74. In this caſe a preſentment is alſo very proper for remedying an inconvenience mentioned in the preamble of the ſtatute of Q. *A. viz.* the raiſing money unneceſſarily. (4) By the words of the act, the ſeſſions muſt make an aſſeſſment of the rates, and the conſtables, *&c.* are to collect; whereas here, the churchwardens, *&c.* are ordered to aſſeſs: Which is very different from collecting, and is in truth a delegation of the authority of the juſtices.

But the whole court were clearly of opinion, (1) That in orders of ſeſſions it is neceſſary to ſhew the commencement thereof, becauſe the exerciſe of the juſtice's juriſdiction is limited by the 2 *H.* 5. *c.* 4. to particular times; and always where a *certiorari* is granted to remove any particular act done by an inferior court, they muſt return what is ſufficient to ſhew that they had authority to do the act: But there is no neceſſity for ſetting out the adjournments, theſe being merely diſcretionary. In ſtatutes it is ſaid, "at ſuch a ſeſſions" generally, without ſetting out the day, becauſe theſe may be held at any time. * (2) The manner of ſetting out the preſentment is well enough, it having been often determined, that

S. P. 2 Stra. 832. poſt. 372.

* To this objection the defendant's counſel cited *The King* and *the inhabitants of Middleſex*, *H.* 10. *G.* 2. where it was excepted to an order made at an adjourned ſeſſions for raiſing the vagrant rate, that it does not appear the order was made by the ſame juſtices who were preſent at the preceding ſeſſions; but over-ruled, the names of ſome of them being mentioned, with the words, "and other their fellows:" Which was held ſufficient. (*A.*)

in

in orders the word "appearing" is ſufficient. (3) The laſt exception is not material, it being neceſſary for the officers to make a particular aſſeſſment in order to collect the rate; and it being impracti-
* P 104 cable for the juſtices to tax *particular perſons. All that theſe can do is, to impoſe a general aſſeſſment; and here this is done.

All the objections, except the third, were therefore now over-ruled: And as to that, the court doubted, and took time to adviſe. See *poſt.* 285.

Ante 85. *Kynaſton* againſt *the mayor, aldermen and aſſiſtants of Shrewſbury.*

Array challenged by the defendants, quaſhed, at the prayer of the plaintiff, without the defendants conſent.

MOTION by ſolicitor *Srange* to quaſh the array, to which a challenge had been taken by the defendants, becauſe the ſheriff was one of the aldermen of *Shrewſbury*; which matter was now pending upon demurrer: And this was prayed at the inſtance of the plaintiff, and for the ſake of expedition. And *Lee* C. J. now ſaid, that he had looked into the books, and was very far from being clear in opinion, that the defendants could take advantage of this matter. And *Page* juſt. ſaid, he was clearly of opinion, that the defendants could not. The caſe was therefore adjourned, for the defendants to conſider if they would conſent to take judgment, that it may be ſo entered, for fear of making a precedent hereof.

And this being moved again another day, and the other ſide refuſing to conſent to the quaſhing of the array, it was urged by Mr. ſolicitor, that the court may

may do it without any expreſs conſent on that ſide, becauſe the defendants have already (in effect) given it by their challenge: And he cited the caſe of *Thornby* and *Fleetwood*, *(a)* where in ejectment the court being equally divided, the plaintiff prayed judgment againſt himſelf, in order to bring error: But the defendant being in poſſeſſion of the lands in queſtion, would not conſent to it: And the court made a rule, that on the inſtance of the leſſor of the plaintiff, *and for ſpeeding the cauſe, the judgment ſhould be given accordingly. * P 105

(a) Stra. 383. Lill. Ent. 524. 2 Bro. P. C. 203. poſt. 197.

And a rule was here granted for quaſhing the array, without conſent by the defendants.

The King againſt *the mayor and aldermen of King's Lynn.*

A *Mandamus* was granted, teſted 20 *November*, 10 *G.* 2. to the mayor and aldermen of *King's Lynn* in *Norfolk*, to reſtore one *Allen* to the office of coroner of the ſaid borough: And the writ ſuggeſted in general, that he was duly elected, ſworn and admitted, without mentioning any time. To this they returned, that ſaid *Allen* 29 *Auguſt*, 10 G. 2. was duly choſen coroner, *&c.* but that neither at the time of his ſaid election, nor ſince that time, nor is he yet admitted or ſworn into the office, and therefore, *&c.*

Mandamus to reſtore *A.* to the office of coroner. The return ſtates that on a certain day he was duly choſen, but that neither at the time of his ſaid election, nor ſince that time, nor is he yet admitted, &c. This is a ſufficient denial of his admiſſion at any time whatſoever; and is a good return.

And

V. Rex. v. *Lyme Regis* Doug. 79.

And it was objected by Mr. *Denison* to the return, that the admiſſion of the party is not ſufficiently denied: For the words [nor is he yet admitted] are to be underſtood only of the time ſubſequent to the election on the 29 *Auguſt*, and he might be admitted before. And he urged, that a return to a *mandamus* muſt be certain to every intent:

(a) 10 Mod. 207.—S. P. *Rex.* v. *Lyme Regis* Doug. 152. 2 Bur. 733. 741.

*And in *The Queen* and *mayor*, *&c. of Pomfret*, (a) *M.* 11 *A.* it was determined, that returns muſt be as ſtrict ſince the *mandamus* act as before. If the writ had been ſpecial, *viz.* that the party was elected 29 *Auguſt*, this return would have been well enough: And ſo it would be, if it had been denied generally that he was admitted: But here it is different, and is like the caſe in *Salk.* 432. And it was alſo ſaid, that the office of coroner of a county is an office for life; (*F. N. B.* 163. K.) and it is not to be intended here that the office is an annual one.

* P 106

*But *per curiam*: The admiſſion of the party is ſufficiently denied in this return; for though the words [nor ſince that time] comprehend only the intermediate time between the election and the teſte of the writ, and conſequently would not alone be ſufficient, yet the ſubſequent words [nor is he yet admitted] deny the party's admiſſion at any time whatſoever: And ſo in the caſe in *Salk.* if it had been ſaid further in the return that the party hath not yet received the ſacrament, it would have been a good one. And *Chapple* juſt. ſaid, that if it be taken, as has been inſiſted on, that the coroner here is an officer for life, then there can be but one

* Certainty to a certain intent *in general* is ſufficient, *Rex* v. *Lyme Regis* Doug. 153.

election,

election, and the return is plainly good. But *per Probyn* juſt. though the coroner of a county is a neceſſary officer, and an officer for life, the coroner of a borough is not a neceſſary officer, and muſt be taken as an annual one.

Mellington againſt *Goodtitle.*

S. C. 2 Stra. 1084.

ERROR of a judgment in ejectment for 100 acres of marſh land and of one beaſt-gate, with the appurtenances, in the county of *Suffolk*: And it was aſſigned for error by Mr. *Deniſon*, that an ejectment does not lie of a beaſt-gate, this being a word inſenſible, and of which the law will not take notice. 1 *Brown.* 129. But if it has any meaning, it muſt be taken either for a piece of land, or a common. If the firſt, the ejectment is not maintainable, becauſe it is uncertain how much it is. *Cro. El.* 339. *Moor* 702. *Salk.* 254. And an ejectment will not lie for a common, this being only a profit *apprendre*. *Hardr.* 57.

Ejectment lies for land and a *beaſt-gate*, in *Suffolk*; for it means either a certain quantity of land; or common appurtenant to the land mentioned.

It was argued *contra* by Mr. *Pilſworth*, that though an ejectment will not lie of a thing ſo uncertain and unknown that the ſheriff cannot deliver poſſeſſion thereof, yet it is maintainable for ſuch things as are known in the *county where the action is brought. And therefore, where in a late caſe (*a*) an ejectment was brought for *Aldercarr* in *Norfolk*, it was held maintainable. *Metcalf* and *Rowe*, (*b*) *Mich.* 9 *G.* 2. in this court. Error of a judgment in ejectment for

* P107

(*a*) Barnes v. Peterſon 2 Stra. 1063.

(*b*) Caſ. T. Hardw. 167.

S P. *per* Lee 2 Stra. 1063.

so many acres of pasture and cattle-gate in a certain pasture called ——— and held good. The meaning of cattle-gate is well known, and is described in 2 *Lutw.* 1157. to be a right of pasture; and so is beast-gate: And for a right of pasture, though this be not a right to the soil itself, an ejectment lies. *Hard.* 330. *Dalis. post. Benloe* 95. *Cro. Car.* 362. Besides, if beast-gate be considered as a right of common, an ejectment now lies for that, if it be annexed to such things for which an ejectment may be brought, and which will pass together in a grant. So formerly an ejectment would not lie for tithes, unless it was specified of what kind they were; but now if an ejectment be brought for a rectory with tithes generally, it is well enough. *Doe* and *Burlace*, (*c*) *Hil.* 6 *G.* 2. in this court. Ejectment for a manor and twenty messuages, and common of pasture for all manner of cattle generally, and also for the advowson of ——— and all tithes whatsoever: And after a verdict and judgment for the plaintiff, a writ of error was brought, and *Trin.* 7 *G.* 2. the judgment was affirmed in the Exchequer chamber; and afterwards in the house of lords.

(*c*) Cited 1 *Bur.* 626, 627, 630.

And *per curiam*: (1) The word beast-gate must be taken to mean a certain quantity of land, by a term well understood in the country where this action is brought: And then this case falls within the reason of the cases cited for the defendant, and particularly of *Metcalf* and *Rowe*, which is in point, cattle-gate and beast-gate being synonymous. And there have been several cases from *Ireland*, where it has been said, so many acres of mountain; and held good, because it is a word well understood in that kingdom. (2) If this word be taken for a common, it must be intended to be appurtenant to the land before

1 *Id. Kildare* v. *Fisher.* Stra. 71. *Holborne* v. *Babbington.* 2 Bro. P. C. 114. on which see 1 Stra. 72.

before mentioned in the declaration; and an *ejectment lies for a common appurtenant: So that, *quacunque via data*, this action is maintainable. Judgment affirmed.

* P 108

Bartholomew againſt *Ireland.*

IN treſpaſs the plaintiff declares, that the defendant entred into his chambers and kept poſſeſſion thereof: And in a ſecond count he ſets out, that at another time defendant broke into his ſaid chambers, taking the lock off the door, and expelling a perſon then being therein, and taking the furniture, *&c.* The defendant pleads firſt, Not guilty; and afterwards he pleads, "by leave of the court according "to the ſtatute," that as to the entry into the chambers and keeping poſſeſſion thereof firſt mentioned, the ſaid chambers were the freehold of *J. K.* at the time of the entry, and that defendant, as the ſervant of *J. K.* entred, *&c.* and concludes with an averment: And then he goes on and ſays, "and as to "breaking into the chambers, mentioned in the ſe-"cond count, and taking the furniture, *&c.*" and pleads the ſame juſtification as before; and that becauſe the goods were there filling up the rooms, he ſeiſed them by way of diſtreſs. To this the plaintiff demurs, and aſſigns for cauſe, that the defendant hath firſt pleaded Not guilty, which goes to the whole declaration; and alſo that it doth not appear, as to the laſt juſtification, that defendant had the leave of the court.

Defendant pleads Not Guilty, and then "by leave of the court, according to the ſtatute" pleads other matter which he concludes with an averment; after which he pleads another plea, without ſaying "by leave of the Court, &c." The leave of the Court is to be taken to extend to both the juſtifications. That leave was not granted to plead double, is only an irregularity and to be taken advantage of by motion, and not as error.

And it was argued by ſolicitor general *Strange* for the plaintiff, (1) That though it be pleaded, and is admitted by the demurrer, that *J. K.* had the freehold, yet the plaintiff may notwithſtanding have a right to the poſſeſſion, as a tenant at will or for years: And this alone will not juſtify the defendant in forcibly breaking open the doors, *&c.* (2) As the de-
* P 109 fendant could not plead theſe *ſeveral matters without leave of the court, it ought to appear on the record that this was granted as to all the matters pleaded: But it doth not appear that defendant had ſuch leave as to the laſt juſtification; for though it be ſet out before the firſt juſtification, yet as that is a compleat plea by itſelf, and properly concluded, and then the plaintiff begins *de novo*, it cannot extend to the laſt: And conſequently it muſt be taken as at common law, which will not warrant two diſtinct pleas. It is not a ſufficient anſwer to this, that the court will take notice of their own acts; for if the record ſhould be removed into another court, it will be impoſſible for that to know if leave was granted, unleſs it be ſet out on the record. Serjeant *Bootle* argued *contra*.

And the whole court were clearly of opinion, (1)
2 Kely. 154. That this is in ſubſtance a good plea: And it is a conſtant rule, that in treſpaſs, upon Not guilty pleaded, a freehold may be given in evidence. (2) To the laſt objection it was ſaid by *Lee* C. J. and *Chapple* juſt. that the words being "by leave of the court according to the ſtatute," the leave of the court ought to be taken to extend to both the juſtifications. But of this *Probyn* juſt. doubted, the firſt juſtification being concluded: But he ſaid, that if leave was not granted to plead the laſt, it is an irregularity which ought to be taken advantage of by motion; and it cannot

cannot be objected by way of error. And to this the C. J. agreed; who alſo ſaid, that ever ſince the act, it has been the practice to ſhew on pleading double, that leave was granted by the court: And this ſeems very reaſonable, becauſe at common law duplicity is ill. Judgment for the plaintiff.†

† "Defendant" it ought to be. See *Ryley* v. *Parkhurſt* 1 Wilf. 219. where this caſe was cited by ſerjeant *Beetle*.

The King againſt *Armſtrong*.

A *Quo warranto* was brought againſt the defendant for acting as one of the bailiffs of the corporation of *Scarborough*: And at the ſame time another *quo warranto* *was brought againſt one *Bell*, as coroner of the ſame borough. Both the defendants pleaded an election, and ſet out the conſtitution of the corporation in the ſame manner; upon which iſſues were joined in *Eaſter* term laſt: And both cauſes went down by conſent laſt aſſiſes to trial, a rule having been before entred into, that the rights of ſeveral other perſons ſhould wait the event thereof. In the *quo warranto* againſt *Bell*, a verdict was found againſt him: But in that againſt the preſent defendant there was no trial, by reaſon of the multiplicity of buſineſs at the aſſiſes. And it was now moved, that he may be at liberty to amend his plea, in ſetting out the conſtitution of the borough.

Plea to a *Quo Warranto* allowed to be amended, after iſſue joined.

* P 110

Againſt

Againſt this it was argued by Sir *Thomas Abney*, ſerjeant *Bootle*, Mr. *Filmer* and others, (1) That a new conſtitution will be made by the amendment now prayed; and this motion is in effect for leave to plead *de novo*. And in *The Bank of England* againſt *Morrice*, (*a*) *executrix*, *Hil.* 7 *G.* 2. where the replication was prayed to be amended, by ſtating, that ſeveral judgments pleaded by the executrix were ſet up by fraud, the amendment was refuſed, becauſe a new caſe would be made thereby. And the caſe of *The King* and *Tutchin* (*b*) is founded on the ſame reaſon. In the late caſe of *The King* and *Ellam*, † the matter prayed to be amended made the iſſue material, which would not be ſo without it; and it was warranted by the charter; and it alſo appeared by affidavit, that it was the miſtake of the clerk: In all which reſpects it differs from the preſent caſe. (2) In point of time there is no caſe which comes up to this: For if the defendant has leave to amend, the plaintiff will be under a neceſſity of making a new replication, which will take up ſo much time that the cauſe cannot be tried the next aſſiſes: And in the caſe * of ſuch offices as are annual, delays may be very prejudicial. And in *The King* againſt *Edwards*, *M.* 8 *G.* 2. ‡ the court refuſed leave to amend, becauſe

(*a*) 2 Stra. 1002. 2 Kely. 165.

(*b*) State Trials, Vol. 5. Edit. 1742. p. 579. Salk. 51. 6 Mod. 268.

* P 111

† *King* and *Ellam*, *T.* 7, 8 *G.* 2. *Q. W.* for acting as mayor of *Cheſter*: Defendant pleads the charter, which directs that the mayor ſhall be an alderman, and nominated by the major part of the citizens and freemen inhabiting within the city, *&c.* and that he was an alderman, and nominated by the majority of the citizens of the city, [which includes the foreign burgeſſes, who have no right to nominate] and after iſſue and demurrer to the plea, it was prayed to amend it, upon an affidavit that the miſtake was undeſigned: And granted. (A) See this caſe reported, Cas. T. Hardw. 42. 2 Stra. 976. 2 Barnard. 440. 445.

‡ *King* and *Edwards*. *Q. W.* for acting as freeman of *New Romney* in *Kent*: Defendant applies for time to plead, which proſecutor offers on his pleading an iſſuable plea, and he refuſes: And then he pleads, ſetting out the conſtitution of the borough, but defectively; plaintiff replies, and defendant demurs: And it was moved for leave to withdraw the demurrer and amend the plea; but denied, a trial having been loſt by the demurrer, and the delay appearing, by the defendant's refuſing to plead an iſſuable plea, to be affected. (A)

cauſe the trial would be delayed, and the caſe would be thereby quite altered. (3) The particular circumſtances of this caſe are ſuch as make ſtrongly againſt the amendment; for it will produce a variance between the conſtitution as ſet out in the plea, and in the affidavits produced againſt the motion for the information: And an information, whether it be for a miſdemeanor, or in nature of a *quo warranto*, ought to purſue the affidavits on which it was granted. Beſides, this is not pretended to be a miſtake, (as in *The King* and *Ellam*) but the preſent motion ariſes from the ill ſucceſs of the *quo warranto* againſt *Bell*, in which this very plea, as it now ſtands, was falſified: And as theſe two cauſes went down by conſent, ſo that it was agreed the conſtitution was ſuch as is therein ſtated, the defendant is now concluded from altering it. It will alſo produce an inconſiſtency between the two records, and tends to introduce perjury. Neither is there any thing here to amend by, as in the ſaid caſe of *Ellam*; nor is there any neceſſity for the amendment, the defendant's office being expired, and there being new officers. This caſe therefore differs from that of the ducheſs of *Marlborough* againſt *Whitmore*, (*c*) where a promiſe being laid to be made to the teſtator, and the evidence being only of a promiſe made to the executor, leave was given to amend the declaration accordingly, becauſe otherwiſe the action would be gone for ever. And for the ſame reaſon, *viz.* the neceſſity of the thing, the amendment was ſuffered in 3. *Lev.* 347. Here too the plea has been already amended. It was further ſaid, that now the record is upon the file, and it cannot be taken off, and another put on; and yet this will be neceſſary if the amendment be permitted; for there muſt be a different *replication from what it now is, and conſequently a new record. And ſerjeant

(*c*) 1 Barnard. 408. 418. 2 Stra. 890. Say. 97. 235. Fitz G. 193.

* P 112

jeant *Bootle* cited to this point *Lee* againſt *Daniell*, this term in *C. B.* Action on the caſe for diverting a watercourſe: And it went down to trial, but was not tried on account of the great buſineſs at the aſſiſes. And afterwards it was moved to amend the declaration by ſtriking out the allegation, that the watercourſe runs contiguous to a wall, and by making other alterations: To which it was objected, that the record was brought into court. It was anſwered, that a *vacatur* might be entered in the margin, and a new record brought in. But the court ſaid, that they never heard of ſuch practice; and that though they would permit a ſmall matter to be altered, they would not ſuffer ſuch material amendments.

It was replied by ſolicitor general *Strange*, (he having his Majeſty's licence) Mr. *Bootle*, Mr. *Deniſon* and others; and they cited, and relied on the following caſes, *viz.* 3 *Lev.* 347. *Ducheſs of Marlborough* and *Whitmore*, (*d*) where the amendment was granted after the cauſe had been carried down to trial, and though it made a new caſe. *Moſtyn* and *Totty* (*e*) in the Exchequer. Action on the caſe for a nuiſance; and the defendant demurred to the declaration. And though an aſſiſes had been loſt, yet the court permitted the defendant to withdraw his demurrer, and plead an iſſuable plea. *King* and *Ellam*. And they ſaid, that there were caſes of amendments where new records have been granted, but that here the cauſe was not entred upon record. And as to *The Bank of England* and *Morrice*, they objected, that there three years had elapſed after the plea, and it might be very inconvenient to the executrix to give the plaintiff leave to reply *per fraudem*, ſhe having firſt pleaded aſſets *non ultra*, and ſhe might have gone on adminiſtring all that

(*d*) Ante 111.

(*e*) Cunn. 42. 54.

that time; which was the reaſon of the determination in that caſe, and therefore it differs from the preſent. And the defendant's counſel offered to accept ſhort notice of trial, and to ſubmit to any terms for bringing on the cauſe to trial in the next aſſiſes.

*The whole court (which argued *ſeriatim*) were * P 113
clear of opinion, that the plea ought to be permitted to be amended, as it does not appear that the defendant has been guilty of the leaſt affectation of delay, and the cauſe may be carried down to trial the next aſſiſes: And they relied on the ducheſs of *Marlborough* and *Whitmore*, and *The King* and *Ellam*, as caſes in point. And they ſaid, that here the proceedings muſt be conſidered as being only upon paper; for though the *niſi prius* roll is to be taken as a tranſcript from the record, yet whilſt the attorney has it in his pocket, the cauſe muſt be regarded in that light: That though the defendant's office be determined, yet other perſons rights will be greatly affected by the event of this cauſe: That the court ought, if poſſible, for the advancement of juſtice, to come at the merits of every cauſe; and this cannot be done here without amending the plea, which is plainly frivolous: That the affidavits produced originally by the defendant do not affect the preſent application, for his buſineſs then was to defend himſelf againſt the information then prayed; but when that is granted, he muſt make the beſt defence he can; and there is no ſuch thing as correcting pleading by affidavit: And that the *quo warranto* againſt *Bell* was againſt him as coroner, whereas the preſent is againſt the defendant as bailiff; and if the one has miſtaken the conſtitution, this is no reaſon againſt the other's ſetting it right. A rule was therefore granted for the amendment, on the defendant's paying coſts, and delivering

delivering the amended plea in a day's time, and taking ſhort notice of trial, with liberty for the proſecutor to reply *de novo*.

S. C. 2Stra. 1084.

Ferguſon againſt *Rawlinſon*.

On affirmance of judgment in a *Qui tam* action, there may be coſts given, though there were none in the original ſuit.

ERROR of a judgment given for the plaintiff in an action *qui tam* upon the ſtatute of 12 *A. ſt.* 2. *c.* 16. of uſury: And the judgment being affirmed, it was moved *by ſerjeant *Hayward* on the 3 *H.* 7. *c.* 10. that coſts may be taxed for the defendant in error; to which point he cited *Dy.* 77. *pl.* 36. *Cro. El.* 617. *Cro. Car.* 145. *Cro. El.* 659. S. C. 5 *Co.* 101. And he ſaid, that in 13 *Car.* 2. *ſeſſ.* 2. *c.* 2. whereby double coſts are given on the affirmance of a judgment in error, actions on penal laws are excepted; which ſhews that in ſuch caſe the party is intitled to ſingle coſts; for *exceptio probat regulam.*

*P 114

It was argued by Mr. *Deniſon* on the other ſide, that all the ſtatutes relating to coſts are to be taken ſtrictly, becauſe there were no coſts at common law. And ſince the caſes in *Cro. El.* the conſtruction of the act of *H.* 7. hath been, that where the plaintiff below is not entitled to coſts or damages, he ſhall not recover coſts in error; as appears by *Cro. Car.* 425. 1 *Lev.* 146. 1 *Vent.* 88. The reaſon is that where no coſts or damages are recovered below, the bringing a writ of error cannot be ſaid to be a vexatious delay. This is the preſent caſe, the plaintiff below being

being entitled only to a judgment for the treble value; and therefore it differs from *Cro. Car.* 145. that being a *quare impedit*, in which damages are recovered. And as this is an action on a penal law, it is within the proviso of 13 *Car.* 2. and there is the same exception in 16, 17 *Car.* 2. *c.* 8.

There being a contrariety in the books as to the present question, the court took time to advise. And the last day of the term, *Lee* C. J. said,† that notwithstanding the cases cited against costs, and also the cases in 1 *Sid.*——*Raym.* 134. the court were unanimously of opinion, the defendant in error ought to have his costs; and this by the express words of *H.* 7. which does not say, "in delay of "execution for damages," but "in delay of exe- "cution" generally: And he mentioned *Cro. El.* 617, 659. as in point. He also said, that the case in 1 *Vent.* 88. might be considered in a different light from the others, upon a very strict construction of the statute: And that the present case is the stronger by reason of the *statute of 8, 9 *W.* 3. *c.* 11. which gives costs to a defendant where judgment is given for him, and affirmed in error.

† *Ex Relatione alterius*

*P 115

A rule was therefore granted for the master to tax costs for the defendant in error.

Merrick

8 C. Caſ. T. Hardw. 409.

Merrick againſt *the hundred of Oſſelſtone.*

Declaration on the ſtatute of hue and cry, rightly concludes "contrary to the form of the *ſtatute, &c.*" though there are ſeveral ſtatutes on the ſubject.

ACTION *qui tam* on the ſtatute of hue and cry; to which defendant pleaded the general iſſue: And the verdict being for the plaintiff, it was objected by Sir *Thomas Abney* and Mr. *Taylor* in arreſt of judgment, (1) That the declaration is not properly concluded, the words being, "contrary "to the form of the ſtatute in ſuch caſe made and "provided:" Whereas it ſhould have been "ſtatutes" in the plural number, there being more ſtatutes of hue and cry than one; particularly by the 8 *G.* 2. *c.* 16. coſts are given to the high conſtable in defending the ſuit, which was not ſo before, and is an additional puniſhment on the hundred: And where by a new act more damages are given than were recoverable before, it is neceſſary to refer to the ſtatute. *Salk.* 505. *Raſt. Entr.* 406, 407. (2) The officer, before whom the bond was entered into, is mentioned in the declaration to be "*Samuel Clark*, "Eſq; ſecondary to *Edward Ventris*, Eſq; chief "clerk to inrol pleas in the court of King's Bench:" Which is a different deſcription from what is contained in the act of *G.* 2. and this ought to be purſued. (3) It doth not appear that the perſon before whom the plaintiff entered into the bond was ſecondary at that time, it being only ſaid, that he went "before *S. C.* Eſq; ſecondary, *&c.*" which relate to the time of the plaintiff's declaring: And the court cannot take notice of the time when ſuch

What is a proper deſcription of the officer before whom the bond was entered into.—"Before S. C. ſecondary, &c."—"to J. H. high conſtable of &c."—"before J. S. juſtice" are ſufficient, without ſaying *then* ſecondary, &c.—It need not be avered that there was but one high conſtable. The *venire*, though *de corpore comitatus*, is ſufficient. See *ante* 99 *French* v. *Wiltſhire.*

officer

officer was admitted into his office. In like manner it is averred, that the plaintiff entered into the bond "to *J. H.* high conſtable of *O.*" and that he was ſworn "before *J. S.* *juſtice:" Whereas in all theſe * P 116
caſes the word [then] ſhould have been uſed, as "then ſecondary," *&c.* and ſo are the entries. (4) The bond is mentioned to be given "to *J. H.* "high conſtable of the hundred of *O.*" which poſſibly might have had two high conſtables; and therefore it ſhould have been averred, that there was but one. (5) The *venire facias* is awarded to the county at large, whereas it ſhould have been to the next hundred: For the 4, 5 *A. c.* 16. which requires the *venire* to be awarded *de corpore comitatus*, excepts actions brought on penal ſtatutes; and that upon which the preſent action is brought is not a remedial, but a penal one. That only can be called a remedial law, where before there was a right of a private nature ariſing from natural juſtice, without any adequate remedy; but where an act of parliament prohibits a thing to be done, which is not *malum in ſe*, or commands a thing to be done for the good of the community, under a penalty, or by way of ſatisfaction of damages, it is properly penal. Now before the ſtatute of *Wincheſter*, (which is for the common good) the party robbed had no remedy againſt the hundred, and conſequently the ſatisfaction he is thereby enabled to recover againſt them is by way of penalty: And in this act, and alſo in the 28 *E.* 3. *c.* 11. it is expreſly called a pain; and in 27 *El. c.* 13. *ſ.* 8. a penalty. The action alſo on this ſtatute hath been always brought in the name of the King, as well as of the party; the reaſon of which, in this and all ſuch caſes, is, that he is intitled to a fine againſt the defendant, for doing or omitting ſomething to the publick detriment: But if this were

were a remedial law, the action ſhould be brought in the name of the party only; as in the caſe of taking away tithes on the ſtatute of *E.* 6. where an action *qui tam* is not maintainable. *Cro. El.* 621. *Raſt. Ent.* 446, 186. That the whole penalty is given to the party robbed, it is not material: For notwithſtanding this, where the act required to be done regards the publick utility, the law is properly penal. 5 *Mod.* 311. *Salk.* 505. The preſent *venire* is alſo miſawarded in this reſpect, that it includes a place intereſted *in the ſuit, *viz.* the hundred againſt
* P 117 which the action is brought. And therefore this ought to have been laid aſide by a proper ſuggeſtion for the purpoſe, and by praying that the jury might come from the next hundred. For theſe reaſons this *venire* is ill, and there was no commiſſion for trying the cauſe, and conſequently it cannot be aided by any ſtatute. *Cro. El.* 605. As to the caſe of the cor-
(*a*) P. Wms 213. poſt 441. poration of *Bewdley*, (*a*) (which may be cited *contra*) there the *venire* was held good, by reaſon of the practice of the court: But here ſuppoſing the practice to have been agreeable to this caſe, yet it having been only ſince the ſtatute of 4, 5 *A.* it is not ſufficient to warrant the preſent *venire*.

It was anſwered by ſolicitor general *Strange* and ſerjeant *Bootle*, (1) That though there are ſeveral ſtatutes of hue and cry, yet that of *Winton* is the only one upon which this action is founded; for the others of 27 *El.* and 8 *G.* 2. lay difficulties only in the way of the party robbed, and it is ſufficient to ſhew a compliance with the circumſtances required by theſe; and the ſeveral parts of the declaration muſt be referred to ſuch of them to which they are applicable. The concluſion is therefore right; and if it had been ſaid "againſt the form of the ſtatutes," it would have been ill. *Yelv.* 116. S. C. *Cro.*

Cro. Jac. 187. And *Lee* C. J. and *Chapple* juſt. agreed, that this is a full anſwer to the firſt objection. And (by *Chapple* juſt.) if the action had been given by ſeveral ſtatutes, the concluſion would not have vitiated the declaration, but muſt have been rejected as ſurpluſage. (2) It was argued, that the officer before whom the party entred into the bond is ſufficiently deſcribed, for that the court is to take notice of their own officers. And by *Lee* C. J. and *Chapple* juſt. the deſcription is very proper, it being only a particular deſcription of the ſame officer, who is barely mentioned in the act. (3) It is to be taken, that the perſon before whom the party entred into the bond was at that time ſecondary; for the court will take notice of their own officers, eſpecially ſuch as are officers on record. And ſo as to the *averment of giving the bond to the high conſtable, P * 118
it is not to be ſuppoſed the bond was given to a private perſon who was afterwards made high conſtable; nor would the averment be true, unleſs he was high conſtable at the time of giving the bond. The ſame may be ſaid as to that part of the declaration relating to the juſtice; which is ſet out in the uſual form. *Vidian* 210. Beſides, in civil actions it is ſufficient if the pleading be certain to a common intent; whereas in indictment, it muſt be certain to every intent. And by *Lee* C. J. though there may be precedents with the word [then] inſerted, yet no caſe has been cited to warrant this objection in the caſe of a declaration. And even in criminal proceedings, as great a latitude has been allowed as is here uſed. For though an indictment for a forcible entry, where the words are *exiſtens liberum tenementum*, without ſaying *tunc*, is ill, and ſo hath been held; yet in the late caſe of *The King* and *Ward*, (*b*) which was an indictment for forgery, it was laid, that the defendant

Moor 606.

(*b*) 2 Lord Ray. 1466. 2 Stra. 747. 1 Barnard 10.

defendant *exiſtens onerabilis* (without the word *tunc*) to deliver allum to the duke of *B.* &c. he forged, &c. and after great argument, the indictment was held to be good. And the C. J. and *Chapple* juſt. ſaid, that this objection being after a verdict, is immaterial; becauſe the plaintiff could not have obtained one upon this iſſue, unleſs he had proved that *S. C.* was ſecondary at the time of giving the bond: And ſo it is in relation to the high conſtable and juſtice. (4) It being averred that *J. H.* was high conſtable of the hundred of *O.* he muſt be taken to be the compleat officer. (5) The ſtatute of *Winton* has been always conſidered as a remedial law, and damages being only recoverable in an action brought thereon, theſe are not to be conſidered as a penalty. And in theſe actions it has been the conſtant practice, ſince the caſe of *Bewdly*, to award *venires* in this manner. Beſides, this being after a verdict, and the trial having been by a jury of the county where the action is laid, it is aided by the 16, 17 *Car.* 2. *c.* 8. And *Lee* C. J. ſaid, that he thought this action is not to be conſidered as a penal one; for which he relied on the caſe of *Smith* and *Phillips*, (*c.*) *Mich.* 4 *G.* 1. *in *K. B.* Motion for an amendment in an action againſt an officer for refuſing to deliver the poll, contrary to 7, 8 *W.* 3. *c.* 25. and the court there held, that in all caſes where a remedy is given to the party grieved by ſtatute, an action brought thereupon is not to be conſidered as a penal one. And the C. J. further ſaid, that it is neceſſary that all actions brought on theſe general acts which have a relation to the publick, ſhould be *qui tam*; but notwithſtanding this, it was there held, that the ſtatute of *W.* 3. was not a penal one, and the party had leave to amend. C. J. alſo ſaid, as to the objection that the defendants are comprehended in this *venire*; that he did not

(*c*) Comyns Rep. 281. Stra. 136. * P 119

not remember, that for this reaſon the practice had been to award a *venire* of the next hundred: And that if the defendants had been upon the jury, there might have been a challenge.

The reſt of the court having ſome doubt on ſome of the objections, particularly the laſt, and *Probyn* juſt. being alſo abſent, the caſe was ordered to ſtand over for conſideration. And the laſt day of this term the C. J. declared, that he was of the ſame opinion *in omnibus* as before; and that the plaintiff ought to have judgment: To which the reſt of the court agreed.

The King againſt *Caſtle.*

S. C. poſt. 241. 2 Stra. 1097.

ERROR of a judgment given in the King's Bench in *Ireland* againſt the defendant, in a *quo warranto* brought againſt him, for uſurping the office of mayor of the borough of *Clonville* * in that kingdom: And the caſe, as it appeared upon the ſpecial verdict, which was given below, and was exceedingly prolix, was in ſubſtance this:

Upon a *quo warranto*, there muſt appear a complete title for the defendant by a good ſwearing in, as well as an election.

The charter requiring that the mayor ſhould be ſworn in, in the preſence of the free burgeſſes and common-

The ſaid borough was incorporated by King *J.* 1. in the fifth year of his reign, by the name of———— and by the charter, the mayor, bailiffs, free burgeſſes and *commonalty, or the major part of them, are impowered to aſſemble themſelves upon ſuch a day and chuſe one of the free burgeſſes, whereof there

* P 120

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* *Clonmell.*

alty, *or the major part thereof*, and the verdict finding that he was ſworn "as well in the preſence of J. P. *quam plurimorum liberorum burgenſium*" this is bad—*Quare* the legality of a by-law to nominate three burgeſſes out of whom the mayor is to be elected. *Quare*, as to acts of officers *de facto*,

office before the mayor for the laſt preceding year, in the preſence of the free burgeſſes and commonalty, or the major part thereof. It was alſo found, that an antient by-law was made [without ſaying when] by the mayor, bailiffs, free burgeſſes and commonalty, *debito modo*, directing that from thenceforth, upon every election of a mayor, the mayor, bailiffs, free burgeſſes and commonalty, ſhall withdraw and nominate three out of the free burgeſſes, whereof one ſhall be elected mayor, and that no perſon not ſo nominated ſhall be elected mayor. An act of parliament made 13 *Car.* 2. was alſo ſet out, whereby the lord lieutenant of *Ireland* for the time being was impowered to make ordinances for the government of the ſaid borough; and in purſuance thereof 23 *September* 1672. lord *Eſſex*, then lieutenant, made an ordinance, that on the election of any officers for the ſaid borough, the names of ſuch perſons ſhall be, within ten days after the election, preſented to the lord lieutenant for the time being for his approbation, and in default of ſuch preſentment or approbation, they ſhall be incapable of acting, and the corporation may proceed to a new election. It further appeared, that *anno* 1725. one *Hamerton* was elected mayor, and approved by the lord lieutenant, but a *quo warranto* afterwards was proſecuted, and a judgment of ouſter obtained againſt him. And *anno* 1726. three free burgeſſes were nominated for mayor according to the by-law, [which was the firſt inſtance, as far as it appeared by the verdict, of its having been ever executed] whereof *R. Moor* was one; and he was choſen mayor by ſome of the burgeſſes, and preſented to and approved by the lord lieutenant, and was alſo

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ſworn into the office, and exerciſed it till the year 1727. when there was judgment of ouſter againſt him; and it appeared that at the ſame time when *Moor* was choſen mayor, and alſo from that time to the year 1731. one *Morgan* was elected mayor by the *major part of the burgeſſes, but without any nomination or approbation by the lord lieutenant; and other perſons from time to time were alſo elected, and were nominated and approved, and acted as mayor; the laſt of which was mentioned to be *John Power*: And on the charter day 1731. the defendant, a free burgeſs, was nominated with two others for mayor, and was choſen mayor by ſome of the perſons "who acted" as mayor, bailiffs, free burgeſſes and commonalty, the ſaid *Morgan* being alſo elected into the ſaid office by the majority, without any previous nomination; and the defendant was afterwards preſented to the lord lieutenant and approved by him, and was ſworn "as well in the "preſence of the ſaid *James Power quam plurimorum* "*liberorum burgenſium*;" and he exerciſed the office of mayor. * P121

The principal queſtions in this caſe were, (1) Whether the by-law ſet out by the jury be a good one. (2) Suppoſing it is, whether the defendant appears to be regularly choſen and ſworn into the office of mayor.

And it was now argued by Mr. *Taylor* for the plaintiff in error, (1) That this is a good by-law: For though corporations are creatures of the crown, and muſt act in conformity to the preſcriptions contained in their charters, yet they may certainly circumſcribe the number of electors, where this was indefinite before, in order to prevent the confuſion ariſing from a popular election. *The caſe of corporations*, 4 *Co.* 77. *b.* 3 *Bulſ.* 71. *Jenk.* 273. And

the ſame argument of conveniency extends to the preſent by-law, which reſtrains the number, not of electors, but of the perſons out of which the mayor is to be choſen; as this facilitates the election, and tends to prevent confuſion. But ſuppoſing that this by-law cannot be ſupported on the footing of publick utility, yet it cannot be conſidered as an uſurpation on the crown, as nothing is contained therein but what the parties had a right to ordain. Both the electors, and the perſons to be elected, have a power of abridging, by common conſent,
P * 112 their reſpective rights: *And here the electors have circumſcribed themſelves, as to the objects of their choice; and the free burgeſſes regulate themſelves only as to their right of being choſen. (2) Though a mayor *de facto* only preſided at the aſſembly when the defendant was choſen, yet the preſence of the mayor at the election being not made neceſſary by the charter, he is to be conſidered at the election not as mayor, but *quatenus* a free burgeſs only. As to the ſwearing, this indeed the charter directs to be before the mayor of the preceding year: But it being a neceſſary act, it is ſufficient if performed before a mayor *de facto*. And in the caſes of *The King* and *Sutton*, *(a)* *Trin.* 4 *G.* 1. and *The King* and *Kynaſton*, *(b)* where it was much debated, what acts by an officer *de facto* are good; it was agreed, that judicial acts, and acts of neceſſity, may be executed by an officer *de facto*, eſpecially where he executes the office without interruption.

(a) Poſt. 167.
(b) Caſ. T. Hardw. 149. 150. ante 85.

On the other ſide it was argued by Sir *Thomas Abney*, (1) That though it muſt be admitted that corporations may make ſuch by-laws as are reaſonable, though there be no clauſe in their charter giving them ſuch power, yet the preſent by-law is void, becauſe it doth not narrow the number of electors,

electors, as in the cases cited *contra*; but it vests a right in three burgesses of being chosen mayor, exclusive of the others; whereas by the charter such right is given to the whole body of burgesses. The consequence hereof may be, that these three persons, by contrivance amongst themselves, may enjoy the office of mayor between them for ever. And it has been held, that where a particular day is appointed by charter for election, it cannot be adjourned by a by-law. Besides, this by-law is destroyed by the same hands that made it; for it appears that *Morgan* has been always chosen mayor by a majority of the electors, without any nomination: So that it was never acquiesced in. And it is observable that *Clonville* * appears to be a modern borough, erected within time of memory. And it is not mentioned when the by-law was made, or whether it be in writing or not; *nor is it found that it was ever put in practice till *Moor*'s election, *anno* 1726. so that here was only about five years usage before the defendant's election: And in the case of *The King* and *Beckworth*, 120 years usage was held not sufficient to support the breach of the charter. And here too *Moor* was afterwards ousted in a *quo warranto*. (2) The election and swearing in of the defendant are ill, as there was then no legal mayor; nor indeed has there been any such since the year 1725. for the persons chosen mayors for the two years following were both ousted by judgment, and consequently the corporation was then dissolved, there being no clause in the charter to warrant the mayor's holding over. And not only the mayor was an usurper when the defendant was elected, but also several of the burgesses and bailiffs who were then present; and it is only found that they acted as mayor, bailiffs and free burgesses.

* Clonmell.

* P 123

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The defendant's ſwearing is alſo ill in this reſpect, that in the charter it is required, that the mayor be ſworn in the preſence of the mayor of the next preceding year, and before the free burgeſſes and commonalty, or the majority: Whereas here it is ſet out, that the defendant was ſworn in the preſence of the "mayor *quam plurimorum liberorum burgenſium*;" which words [*quam plurimorum*] ſignify only a great many, and not the majority. And in the caſe of *The King* and *the mayor of Penryn*, *(c) Eaſt.* 10 *G.* 1. where the defendant was duly elected, but not well ſworn in, there was judgment of ouſter againſt him. It was further objected, that the verdict ſets out, that the defendant was ſworn in "before the ſaid *James Power*," whereas *John Power* is before ſtated to be mayor at the time of the defendant's election, and no ſuch perſon is mentioned as *James Power*. [But this objection the court immediately over-ruled, the words being "before the ſaid *James Power*."]

(c) 2 Ld. Ray. 1447. Stra. 582. poſt 125. 261.

It was replied, amongſt other things, that though the by-law is not ſet out to be in writing, yet it being mentioned to be made *debito modo*, this objection is not material. And as to what is ſaid, that ſeveral of the members * preſent at the aſſembly when the defendant was elected were uſurpers; this does not appear by the verdict. As to the ſwearing, the words "*quam plurimorum*" may properly be underſtood of a majority, and it is not to be intended that a minority only were preſent, eſpecially as it is plain that a great many were there.

* P 124

Lee C. J. and *Probyn* juſt. were of opinion, that this by-law, which is made by the whole body, is good as to the ſubject matter of it; nothing being done by it but regulating the election, by conferring a power on the mayor, bailiffs and free burgeſſes, of nominating three perſons in order to be

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choſen mayor; which ſeems a very reaſonable regulation, and to fall within the reaſon of the caſes cited for the plaintiff. But *Page* juſt. doubted if the by-law is good. And *Chapple* juſt declined giving any opinion on this point; but he ſaid, that he had known caſes, where a ſelect body had a power to make by-laws; and it has been objected, that they cannot reſtrain the number of the perſons to be elected: But that here it may be different, becauſe this by-law is made by the whole body. *Lee* C. J. alſo ſaid, that the uſage was not material on this record; for the force of uſage ariſes only from the ſuppoſition of a by-law, of which, where there is none in being, it is evidence, examinable by the jury: But here a by-law is found. And as to the election itſelf, *Probyn* juſt. ſaid, that it doth not appear that the mayor who preſided at it was an illegal one, it being mentioned, that the mayor, bailiffs and burgeſſes acted as ſuch; and their right was not in judgment before this jury. And he ſaid further, that an officer *de facto* may do ſuch acts as are for the preſervation of the conſtitution, all one as the lord of a manor *pro tempore* may do neceſſary acts. The reſt of the court were ſilent upon this point: But they all held, that it was not here ſufficiently ſhewn the defendant was ſworn before a majority, for the words "*quam plurimorum*" do not neceſſarily ſignify this, but ſeem rather to imply a minority: And in theſe caſes a compleat title muſt be ſhewn, by a good ſwearing, as *well as an election; as it was determined in the houſe of lords, in the *The King* and *Pindar*. (d)

Poſt. 163.

*P 125

Upon this objection therefore the court were ſtrongly inclined to affirm the judgment. But ſerjeant *Parker* being retained to argue the caſe for the defendant, an *ulterius concilium* was now granted. *Poſt.* 241.

(d) Ante 123.

Berrington

S.C. 2 Stra. 1086. 4 Bro. P. C. 353.

Berrington on the demiſe of Dormer againſt *Parkhurſt and others.*

An actual entry is neceſſary to avoid a fine. The demiſe in the ejectment muſt be laid ſubſequent to that entry.

AN ejectment was brought on a demiſe made 1 *October* 1731. to hold from *September* then laſt for twenty years; and upon Not guilty pleaded, a ſpecial verdict was found: And the caſe was in effect this:

John Dormer, Eſq; and Sir *John Dormer*, (his ſon and heir apparent) being ſeiſed of the lands in queſtion in fee, by feoffment dated 13 *Auguſt* 1662. and common recovery, conveyed the premiſſes to truſtees and their heirs, part thereof to be to the uſe of Sir *John Dormer* for ninety-nine years, determinable on his life, "and after his death, or other ſooner "determination of the eſtate limited to the ſaid "Sir *John Dormer*," to the uſe of the ſaid truſtees "during the life of Sir *John Dormer*," to preſerve the contingent uſes, "and after his deceaſe" to *Suſanna Brown* (the intended wife of Sir *John Dormer*) for her life for her jointure: And as for the reſt of the premiſſes, to the uſe of *John Dormer* for his life, remainder to the uſe of Sir *John Dormer* for ninety-nine years, determinable on his life; and after the determination of the ſaid ſeveral eſtates, all the premiſſes are limited to the uſe of the firſt and other ſons of Sir *John Dormer* on the ſaid *Suſanna*, in tail male; and after ſeveral other uſes, "to the uſe of "*Robert*

" *Robert Dormer*, ſecond ſon of the ſaid *John Dor-*
" *mer*, for ninety-nine years, if he ſhall ſo long live;
" and from and *after the death of the ſaid *Robert* P * 126
" *Dormer*, or other ſooner determination of the eſtate
" herein limited to the ſaid *Robert Dormer* for nine-
" ty-nine years as aforeſaid, to the uſe of ſaid Sir
" *R. J.* and Sir *W. C.* [the truſtees] and their heirs,
" for and during the natural life of the ſaid *Robert*
" *Dormer*, upon truſt to ſupport contingent remain-
" ders, and for that purpoſe to bring actions and
" make entries as occaſion ſhall require, but to per-
" mit the ſaid *Robert Dormer* and his aſſigns to take
" the rents and profits thereof during his natural life,
" and after the end or other ſooner determination of
" the ſaid term," to the uſe of the firſt and other ſons of *Robert Dormer* in tail male; and after ſeveral other remainders, [which are now ſpent] to the uſe of *Euſeby Dormer* [the father of the leſſor of the plaintiff] for ninety-nine years determinable on his life, with remainders to the truſtees to preſerve contingent remainders, and to the firſt and other ſons of *Euſeby* in tail male, [as before] remainder to ſaid *John Dormer* in tail general, remainder to his heirs and aſſigns.

Eaſter term 1726. *Robert Dormer*, who was then poſſeſſed of the premiſſes for ninety-nine years, determinable on his life, (all the preceding limitations being ſpent) and *Fleetwood* his only ſon levied a fine of the ſaid premiſſes, whereupon a recovery was ſuffered to the uſe of *Robert* in fee.

22 *June* 1726. *Fleetwood*, ſon of *Robert*, died without iſſue.

16 *September* 1726. *Robert* died, leaving four daughters only; who with their huſbands (one of whom was Mr. juſtice *Forteſcue Aland*) thereupon entred into the ſaid premiſſes.

And

And *Eaſter* term 1730. the ſaid daughters and their huſbands levied a fine of the ſaid premiſſes.

* P 127 *3 *September* 1731. *Euſeby Dormer* died, leaving iſſue *John Dormer* his eldeſt ſon: And the meſne remainders being ſpent,

10 *September* 1731. the ſaid *John* entred into the ſaid premiſſes to make the demiſe in the declaration; and 6 *January* 1731. he actually entred into the premiſſes, claiming the ſame as his eſtate and freehold.

The queſtions in this caſe were, (1) Whether the eſtate-tail, which *John Dormer* (the leſſor) was intitled to under the ſettlement, at the death of *Euſeby* his father, is barred, either by the fine levied by *Robert* and his ſon *Fleetwood*, and the recovery ſuffered thereupon, or by the fine levied by the daughters of *Robert* and their huſbands. (2) Suppoſing that the leſſor hath a right to the premiſſes, whether he has purſued the proper method for recovery thereof, by bringing this ejectment; and whether this action be maintainable, as the day of the demiſe is laid before his actual entry for avoiding the laſt fine.

And it was argued laſt *Hilary* term by Mr. *Bootle* for the plaintiff, and ſerjeant *Wright* for the defendants; and this term by Mr. *Chute* for the plaintiff, and ſolicitor general *Strange* for the defendants.

It was argued for the plaintiff, (1) That no act has been done ſufficient to defeat the leſſor's right. For as to the firſt fine, conſidering this as levied by *Robert Dormer* only, it can have no manner of operation, becauſe he was but tenant for years; and conſequently as he had only a chattel intereſt, and a fine is in nature of a real action, the fine *nil operatur*, and is a mere nullity. *Saffyn's* caſe, 5 *Co.* 123. *b.* 124. *a.* 3 *Co.* 77. *b.* *Hardr.* 400. 2 *Lev.* 52. S. C. 2 *Vent.* 334. And it cannot be regarded as a fine founded

founded on a diſſeiſin, becauſe it is not found that *Robert* was out of poſſeſſion, but the contrary. *Litt. ſect.* 279. Neither can this fine have any effect, conſidered as levied *by *Fleetwood*, for the ſame reaſon as is before mentioned, *viz.* becauſe the freehold was in other perſons, and he had only a remainder expectant thereon: For the truſtees had an eſtate paramount and prior to that of *Fleetwood*; and therefore their eſtate could not be barred or diſplaced by his fine, it being impoſſible that a diſcontinuance ſhould be wrought by one who is not privy in eſtate. *Litt. ſect.* 637. 9 *Co.* 106. *a.* 10 *Co.* 96, 97. 1 *Sid.* 83. And the warranty in the fine is not in the leaſt material, becauſe it does not deſcend on the preſent leſſor. This fine therefore being void, *quia partes finis nihil habuerunt*, and no eſtate being thereby deveſted or diſplaced, it is to be thrown out of the caſe as intirely immaterial. And as the recovery is ſuffered thereon, this muſt drop too, becauſe if the fine is void, there could be no good tenant to the *præcipe*, the freehold ſtill remaining in the truſtees for ſupporting the contingent remainders. The next thing to be conſidered is, the fine levied by the daughters of *Robert* and their huſbands, (who have no manner of claim under the ſettlement) and the legal conſequences thereof. Now all the effects which a fine can poſſibly have, muſt be either by way of bar or of diſcontinuance. It is plain that this fine cannot work by way of bar, it being expreſly found that the leſſor entred into the premiſſes within five years after the levying of it, according to the ſtatute of 4 *H.* 7. *c.* 24. and the preſent action is brought within one year after the entry, as is required by 4 *A. c.* 16. Neither can it work a diſcontinuance, becauſe the defendants, without any right

* P 128

or

or colour of title, under the ſettlement, entred into the premiſſes, whereby they became diſſeiſors, and gained the intire fee. *Litt. ſect.*——Their acts therefore cannot amount to a diſcontinuance; for to make this, (1) There muſt be an eſtate deveſted; (*Co. Lit.* 327. *b.*) and this was impoſſible in the preſent caſe, as there was no eſtate left in the diſſeiſee. And (2) none can deveſt an eſtate-tail but one who was once ſeiſed thereof: (*Co. Lit.* 333. *b.* 338. *b. ſect.* 637.) Whereas here the leſſor was intitled to an eſtate-tail, which the cogniſors were utter ſtrangers to. And in
* P 129 this *caſe the warranty can make no diſcontinuance, becauſe that can only diſcontinue the eſtate of him on whom it deſcends. To the ſecond point it was argued, that as the leſſor's right of entry ſtill continued, for the reaſons before mentioned, he may bring an ejectment, and lay the day of his demiſe at any time ſubſequent to the diſſeiſin, and to the accruing of his title, in order to recover the meſne profits. And though the day of the demiſe is here antecedent to the leſſor's entry, yet this action is maintainable, becauſe the entry was not neceſſary to intitle him to the action, but only to preſerve his right of entry: And as this ejectment is brought within five years after the fine, and conſequently the fine has no effect, there was no need of proving any entry. The finding therefore of the time when the leſſor entred, is to be rejected as a circumſtance quite immaterial; for the ſaving of a grant or ſtatute is to be conſidered as part thereof; (*Cro. El.* 372. *pl.* 19. *Cart.* 99.) and conſequently when the leſſor proved himſelf to be within the ſaving, it was ſufficient, as he was thereby taken out of the ſtatute: And it appears that at the time of the demiſe he had an eſtate in the premiſſes, the word *ſaving* implying the exiſtence of the thing ſaved.

ſaved. Upon this verdict he has a compleat title: And a verdict will ſometimes cure a fatal miſtake in the declaration, even where the realty is concerned. *Sav.* 109, 110, 111. It is alſo material, that in ejectment the demiſe is only a fiction in law, and a matter *in pais* between the leſſor and leſſee; and in this caſe it works an eſtopple between them, becauſe it being for twenty years, it muſt be by deed. Here is alſo a confeſſion of leaſe, entry and ouſter; and as the leaſe muſt be made on the land, the parties admit by this confeſſion, that the leſſor was then in poſſeſſion, and are concluded hereby. Beſides, by the leſſor's entry he was remitted, and conſequently muſt be conſidered by relation, as having been in poſſeſſion *ab initio*. All tortious and injurious acts done during the diſſeiſin are thereby purged: (11 *Co.* 51. *a. b. Hob.* 98.) And by the ſame reaſon it makes good all the meſne acts done by the diſſeiſee, except ſuch as are void, which *indeed will not be validated thereby. 2 *Co.* 55. *b.* It is alſo proper to be conſidered, whether an ejectment is not a proper action within the ſtatute of *H.* 7. for avoiding a fine. Now formerly, the uſe of ejectments was only for a termor to recover his term where his lord ejected him, and afterwards they were uſed upon an ejectment by a ſtranger: But in the time of lord *Dyer*, they began to be brought in the place of other real actions, and have ever ſince been uſed accordingly. *Hale*'s preface to *Rolle's Abr.* It is therefore reaſonable that this ſhould be taken to be an action within the meaning of the act, according to the old rule, *ad ea quæ frequentius accidunt jura adaptantur*: For laws are always to be conſtrued according to the exigencies of the times, and are often taken to extend to remedies which were not uſed at the time of mak-

* P 130

ing

ing them, but are ſubſtituted in the place of ſuch as are ſpecified therein. So the 4 *E.* 3. *c.* 7. which gives an action of treſpaſs to executors *de bonis aſportatis*, though it does not in the leaſt favour of the realty, yet it extends to ejectments. 9 *Co.* 78. *b.* And an action of trover will alſo lie within that ſtatute, though it was not then uſed, but was afterwards introduced and ſubſtituted in the place of detinue and treſpaſs. *Cro. El.* 377. And even in criminal matters acts of parliament have been taken, by equity, to extend to caſes not ſpecified in the ſtatute, where they have been within the miſchief. *T. Jones* 159. Another rule is, that laws ought to be ſo expounded as tends moſt effectually to advance the remedy inſtituted, and ſuppreſs the ill provided againſt by them: But if an ejectment, which is *feſtinum remedium*, and an eaſy and beneficial method for recovering of poſſeſſions, and ought therefore to be favoured, is not to be taken as included in this act, the injurious methods of gaining eſtates by diſſeiſins, fines, and nonclaims, where there is no right, will become more effectual; eſpecially as the generality of people cannot be ſuppoſed to know the difference between real and mixt actions, and that an ejectment is not within the act. Beſides, the ſtatute is very general; and the word [action] which is there
* P 131 uſed comprehends an *ejectment though it be a poſſeſſory action, as well as any other. And in ejectments, the right and title to lands are tried, all one as in real actions, and they have exactly the ſame effect. The reaſon of the act, in requiring an action to be brought in five years, is alſo fully anſwered by an ejectment, that being only that a right to lands may not lie dormant for a long time, and ſtart up afterwards to the prejudice of purchaſers: And it has

has been allowed as ſufficient to ſave the time upon the ſtatute of *Jac.* 1. of limitations, becauſe it anſwers the purpoſe of real actions, in being notice, equally with thoſe, to the tenant in poſſeſſion. And laſtly, (it was ſaid) there is no caſe where it is determined, that an ejectment, at this time of day, is not comprehended within the act.

On the other ſide it was argued, (1) That the fine levied by *Robert*, though he was tenant for years only, is not void, but voidable only, by entry or action; and the exception, *quod partes finis nihil habuerunt, &c.* implies, that it muſt be avoided by proper pleading in an action. Such fines are certainly good by concluſion between the parties. *Bro. Fines levie* 109. And though nonclaim will not prevent ſtrangers from taking advantage of the above exception, *(Moor* 251.) yet ſuch fine is a bar till it be properly avoided. As to the joining of the remainder-man *(Fleetwood)* in this fine, ſuppoſing an intermediate eſtate of freehold in others, this will be of no avail; but as the limitation to the truſtees is here penned, the freehold was in *Fleetwood*, and not in the truſtees: For the remainder limited to them is either a void or contingent one; in either of which caſes the remainder to the firſt ſon of *Robert* became veſted as ſoon as he was born. By the firſt part of the limitation, the eſtate is limited "after *Robert*'s death" to the truſtees to hold "for his life:" Which is abſurd and void, as being impoſſible to take effect. *Co. Lit.* 28. *b. Cholmley*'s caſe. 2 *Co.* 51. *a. Yelv.* 149. *Noy* 132. The other words [or other ſooner determination] plainly make the remainder contingent: And though the truſtees were *in eſſe*, this will not make it a *veſted intereſt, it being to ariſe on a future accident. *Boraſton*'s caſe, 3 *Co.* 19. S. C. 2 *Roll.*

* P 132

Roll. 419. Theſe words muſt mean ſomething to happen in the life-time of *Robert*, becauſe the truſtees are, by other words, to hold after his death: And as no contingency then happened, (for the joining of *Robert* with *Fleetwood* in the fine makes no forfeiture, but each thereby granted what he lawfully might) the conſequence is, that the firſt remainder that could veſt did veſt; for the law will not ſuffer the freehold to remain in abeyance. *Bowles*'s caſe, 11 *Co.* 80. *a.* And this conſtruction is alſo enforced by the ſubſequent limitation to the firſt ſon of *Robert*, the words being, "and after the end or other ſooner determi- "nation of the term;" which muſt mean the term of ninety-nine years, limited to *Robert:* So that by the words of the deed, as ſoon as a ſon is born, the eſtate of the truſtees is to end. And the intent of the parties is not fruſtrated by this conſtruction, becauſe there was no need of a continuance of the eſtate of the truſtees, when the very perſon was born to take the remainder for whoſe ſake the limitation to them was made. In a court of equity, truſtees are always conſidered as the inſtruments only of the perſon for whoſe ſake they are made truſtees; and therefore if they were to do any act which they had a legal power of doing at the inſtance of ſuch a perſon, they would not be ſubject to cenſure. And a court of law, where the parties now are, will not reject ſenſible words out of a deed. For theſe reaſons this fine is well levied; and conſequently there was a tenant of the freehold, againſt whom the whole eſtate could be recovered: And the leſſor is barred by the recovery, on account, not of a recompence but of a better right in the defendants. As to the fine levied by the defendants, this (it was admitted) could not make a diſcontinuance, becauſe they had no eſtate. They were diſſeiſors of the fee; and ſo it is agreed on the other ſide. And a fine levied by a diſſeiſor with non-

claim

claim is an effectual bar; for if the parties be ſeiſed of the freehold, it is not material whether it be by right or wrong; and to ſuch fine it cannot be excepted, *quod partes finis nihil habuerunt.* 3 *Co.* 79. *a. b.* * P 133 87. *b. Co. Lit.* 298. *a.* 372. *b.* 2 *Lev.* 52. The act of *H.* 7. is a ſtatute of repoſe, and a fine levied according to it is notice to all perſons of an eſtate gained thereby; and conſequently if they who have right do not aſſert it in time, it is their own fault. However, as ſuch fine alone is not an effectual bar, the next point to be conſidered is, whether the plaintiff can recover in this ejectment, the day of the demiſe being laid before the entry of the leſſor. At common law there were four ways of claim, two by record, as by *præcipe quod reddat*, or entry of a claim entred in the record of the foot of the fine, and two *in pais*, as by actual entry or continual claim. And by the ſaving of the ſtatute of *H.* 7. they are reduced to two only, *viz.* action and lawful entry. The queſtion then is, what is the meaning of theſe words in the act; which being a quieting one, the ſaving thereof is to be conſtrued ſtrictly. *Moor* 457. As to the word [action] this cannot take in ejectments, becauſe (it is admitted) theſe were not in uſe, unleſs in ſpecial caſes, in the reign of *H.* 7. and even now they will not lie in all caſes, as after a deſcent, or the time of limitation expired: And ſtatutes and grants are to be expounded according to the time when they were made. Beſides, an ejectment is only a fictitious proceeding, (*Salk.* 246.) and the act certainly means, not a fictitious but a real action. It is alſo a ſuit, not of the leſſor but of the plaintiff in ejectment. 2 *Roll.* 653. *pl.* 29. *Goodtitle on the demiſe of lord Gower* and *Thruſtout*, *(a) Mich.* 9 G. 2. in this court. In ejectment it was objected, that a knight ought to be returned on the jury; but

(a) 2. Strn. 1023.

the court over-ruled the objection, becauſe it was to be conſidered as the ſuit of the leſſee: And they cited *Holborne* and *Kingſton*, (*b*) in the houſe of lords, brought by writ of error from *Ireland*, where in ejectment the ſame point was determined accordingly. There is alſo a great difference between actions brought for recovering the freehold, and poſſeſſory actions, which an ejectment is. The other words in the ſtatute mean an actual entry. 2 *Inſt.* 518. And it has been determined, that an entry in ejectment is not *ſufficient to avoid a fine. 1 *Sand.* 319. S. C. 1 *Vent.* 42. S. C. 1 *Mod.* 10. S. C. 2 *Keb.* 555. *Skin.* 424. And accordingly it was reſolved, *anno* 1703. by all the judges of *England*, except baron *Price*, that in caſe of a fine, there muſt be an actual entry; and an entry to deliver a declaration in ejectment is not ſufficient. [Which reſolution is not reported in any of the books.] The conſequence hereof is, that in this caſe the actual entry being after the demiſe, this cannot ſupport the preſent action, though it will take away the effect of the fine: For it is impoſſible that one out of poſſeſſion ſhould maintain a poſſeſſory action; and it is contrary to experience that an entry after the day of the demiſe ſhould maintain an ejectment by way of relation. Formerly, as it has been admitted, an ejectment lay only between a leſſor and leſſee; and therefore it would be very ſtrange if a diſſeiſee can now maintain one againſt a diſſeiſor before entry. And the ſtatute of 4 *A.* *c.* 16. means an actual entry, and ſhews that a previous one is requiſite. Upon the whole matter therefore the party is at leaſt barred of this action, he having made no entry before the demiſe to gain the poſſeſſion.

(*b*) *Holborne on dem. Ld. Kingſton.* v. *Babbington* 2 Bro. P. C. 114. ante 89.

* P 134

V. *Gates* v. *Brydon*, 3 Bur. 1897. *Goodright* v. *Cater*, Doug. 460. *Jenkins* v. *Prichard*. 2 *Wilſ.* 45. Bul. N. P. 103.

It

It was replied in anſwer to the principal objection, that the freehold was in *Fleetwood Dormer* at the time of levying the firſt fine; that as in purchaſes the pecuniary conſideration makes it reaſonable to conſtrue deeds againſt the grantor, ſo in the caſe of voluntary deeds and family ſettlements, the conſtruction muſt be guided by the intent of the donor, *ut res magis valeat quam pereat.* *Litt. ſect.* 283. *Plowd.* 161. *Benl.*———*Finch* 60. And this rule holds place moſt ſtrongly in thoſe caſes where the intent is to keep an eſtate in the male part of the family, which is preferable to the female, as by the former the name is preſerved. *Plowd.* 305. *Litt. Rep.* 219. It is alſo to be remarked, that both wills and deeds are to be conſidered as they ſtood at the time of their making; and therefore in *Williams* and *Browne*, (*c*) *Mich.* 8 *G.* 2. in this court, where the queſtion was upon a will in relation to croſs *remainders, it was ſaid by lord *Hardwicke*, that though at that time there were but two perſons *in eſſe*, the caſe was to be conſidered as it ſtood at the time of the will; and therefore as there might have been more perſons in being, the court determined againſt the croſs remainders, according to the rule, that there cannot be ſuch remainders between more than two by implication. So here, as the eſtate of the truſtees was limited only to ſupport the remainder to the firſt ſon of *Robert*, if he had not been born till after the determination of *Robert*'s eſtate, and his being born before was merely accidental, the ſettlement is to be conſidered in the ſame manner as if he had not been born till afterwards. It is another general rule, that remainders are never to be conſidered as contingent, where by any conſtruction they can be taken for veſted. *Chudleigh*'s caſe, 1 *Co.* Now as to the deed itſelf, it is to be obſerved

(*c*) 2 Stra. 996. 2 Barnard. 231. 416.

P * 135

See Cowp. 777. 797.

in general, that by the firſt part thereof a good eſtate of fee-ſimple is veſted in the truſtees; and no more is to be taken from them than what is ſufficient to ſerve the donor's intent as to the uſes. In *Shaw* and *Weigh* (*d*) in *K. B.* there was a deviſe to truſtees by ambiguous words, and they were enlarged in order to ſerve the uſes. Beſides, as *Robert* was plainly but a tenant for years, if the freehold was not in the truſtees, it muſt have been in abeyance, if the birth of a ſon, which was merely accidental, had not happened; and then all the uſes might have been fruſtrated by a feoffment by *Robert*. As to the words, "and from and after the death of the ſaid *Robert*, "or other ſooner determination of the eſtate herein "limited to the ſaid *Robert* as aforeſaid, *&c.*" theſe are inſerted only to accelerate the entry of the truſtees for the preſervation of the uſes both implied and expreſſed, and muſt be conſtrued *reddendo ſingula ſingulis*. And it is to be obſerved, that the ultimate determination of *Robert*'s eſtate is certain, *viz.* the end of the term of ninety-nine years by efflux of time; and his death and forfeiture are things which would be implied in law if theſe words had been omitted; ſo that the time is the true meaſure of his eſtate. *Plowd.* 108, 109. *Dy.* 261. *b.* 1 *Co.* 154. From
* P 136 *hence it follows, that though *Robert*'s death or forfeiture are things which might or might not happen, yet as the term muſt neceſſarily end as aforeſaid, the remainder to the truſtees is not contingent. *Boraſton*'s caſe, 3 *Co.* 21. *a. b. Pollex.* 56. *Raym.* 427. *Hutt.* 118. The words juſt before the limitation to the firſt ſon of *Robert*, [after the end, *&c.* of the ſaid term] may as well be conſtrued to mean the eſtate *pur auter vie* limited to the truſtees, as the term limited to *Robert*. Laſtly, if the conſtruction contend-

(*d*) 2 Stra. 798. Fitz-G. 7. Fort. 58. Eq. ab. 184.

ed

ed for by the plaintiff be allowed, the intent of the grantor will take place; and this is such as the law commends, *viz.* the honour and name of the family, which ought to be preserved notwithstanding a little inaccuracy in the composer of the settlement.

The court, who argued *seriatim*, gave no opinion upon the first point: But they unanimously held, (1) That an actual entry is necessary to avoid a fine; and this is now so fully settled, that it is not to be doubted or disputed. And C. J. said, that this is by way of conformity with the antient method of avoiding fines, which is mentioned in 2 *Inst.* 518. (2) It was also resolved, that this action is not maintainable, because the demise is previous to the entry: For in the case of a fine, the party hath no title before an entry; the reason whereof (as C. J. said) does not arise from the statute of *H.* 7. but from the puissance of a fine at common law, this being in the nature of a recovery in a real action: And consequently the demise is absolutely void, and it cannot be made good by a subsequent entry by relation, which can make good such acts only as are voidable. This case therefore is not parallel to an action brought by a disseisee after entry for the mesne profits, to which it has been compared; for here if the lessor is intitled to the mesne profits from the time of his demise, he will recover them from a time when he had no title; whereas in the other, the profits are recoverable only from the time when the disseisee had a title. And *Chapple* just. said, that there was a great difference between an entry for purging a disseisin, and an * entry for avoiding a fine; for which he cited *Moor* 450, 457. * P 137

Upon

Upon this ſecond point judgment was given for the defendants. And a writ of error being afterwards brought in parliament, it was there affirmed.

Note; Upon the firſt argument of this caſe, lord *Hardwicke*, then C. J. of this court, was ſtrongly inclined to think, (but without giving an opinion) that this action was not maintainable, for the ſame reaſon which the court now went on, *viz.* becauſe the demiſe is laid before the entry, and conſequently is to be conſidered as abſolutely void, the leſſor being then out of poſſeſſion.*

See the caſes referred to Ante p. 134 margin.

Poſt. 315.

* *Mich.* 14 *G.* 2. in *K. B.* in a new ejectment brought by the ſame parties for the ſame lands, where the demiſe laid was ſubſequent to the entry, a ſpecial verdict was found to the ſame effect as in this caſe: And after great debate and conſideration, it was unanimouſly held, that the remainder to the truſtees was good, by reaſon of the words, [or other ſooner determination] and that it was not a contingent but a veſted remainder, to take effect in poſſeſſion on the determination of the precedent eſtate in any manner; and conſequently that the fine being levied by tenant for years was void, and the recovery too. Judgment therefore for the plaintiff: And afterwards it was affirmed in parliament. (A) 4 Bro. P. C. 405. See. 3 Atk. 135. where the opinion of the Judges, as delivered by Lord Chief Juſtice *Willes*, is reported.

The

The King againſt *Haddock*.

INDICTMENT at a ſeſſions mentioned in the caption to be "held 5 *April* 1737. for the "conſervation of the river *Thames* at *Fulham*, *&c.* "before Sir *John Thomſon*, mayor of the city of "*London*, and conſervator of the river of *Thames*, "and of the water of *Medway*:" And it was for putting and placing on the ſoil of the ſaid river of *Thames* on the firſt day of *Auguſt* 1732. [in figures] 200 [in figures] loads of brick, *&c.* to the damage of the King's ſubjects. To this indictment the defendant demurs.

Upon a return of a *certiorari* to remove an indictment, it is not neceſſary that it ſhould appear by the caption, by what authority the court was held, but it muſt appear that the inferior court has juriſdiction. *Quære*, whether this ſufficiently appears in the caſe at bar, whether; numbers may be expreſſed in common figures in an indictment, and whether want of addition can be taken advantage of on demurrer. An indictment for a nuiſance on the *Thames* need not ſtate the *terminus a quo*, and *ad quem* it flows.

And it was argued laſt *Michaelmas* term by Mr. *Filmer* for the defendant, and ſolicitor general *Strange* for the proſecutor; and this term by ſerjeant *Wright* for the defendant, and Mr. *Bootle* for the proſecutor: And the defendant's * counſel took the following exceptions to the indictment.

* P 138

1. In the caption it is not ſhewn by what authority the court was held, whether it be by cuſtom or charter: And without this the caption is not compleat, the reaſon of a caption being in order to ſhew a juriſdiction. So it is in the caſe of proceedings before commiſſioners, of *oyer* and *terminer*, of gaol delivery,

delivery, and before juſtices of peace. *Hale's Hiſt. P. C. Vol.* 2. 166. *Tremaine* 200, 219, 230, 280, 307, 330. 2 *Keb.* 139. *Salk.* 195. *King* and *Stoughton* (*a*) *Hil.* 4 *Geo.* 2. Indictment for a nuſance found at a ſeſſions ſaid to be "held *coram cuſtod' pacis nec non juſticiariis ad pacem & oyer & termi-ner*; and it was objected, that the words [*cuſtod' pacis*] were not a ſufficient deſcription, and that the other words [*nec non juſticiariis*] did not help it: And *Paſch.* 4 *G.* 2. judgment was given for the defendant, upon this and other objections. [But *Lee* C. J. ſaid, that he believed the court delivered no opinion upon that exception.] And ſo if a party juſtifies in pleading under a proceſs or judgment in an inferior court, he muſt ſhew by what authority that court is holden. 8 *Co.* 133. *a. Cro. Jac.* 184. 2 *Lutw.* 1457. 3 *Lev.* 141. 1 *Saund.* 74. It is alſo material, that by this caption the lord mayor of *London* claims the conſervancy of the *Thames* and *Medway* generally; whereas there is no ſuch officer: For by the 17 *R.* 2. *c.* 9. and 1 *H.* 4. *c.* 12. the juſtices of peace have the conſervancy of the rivers within their reſpective counties, and the mayor of *L.* has only a limited authority: And it is well known that the *Thames* riſes at *Thane* in *Oxfordſhire*, and paſſes through ſeveral counties. Rivers and highways are conſidered as infinite. No juriſdiction therefore appears by this caption to be in the perſon before whom this indictment was taken. Beſides, there are two different conſervancies, *viz.* one with reſpect to the fiſhery, and another with reſpect to nuiſances; and it is not expreſſed which of them is meant here. (2) The year of the lord when the offence was committed, and alſo the quantities of brick, are expreſſed in common figures, which in indictments is not allowable. 2 *Hale's Hiſt. P. C.* 170.

(*a*) 2 Barnard. 347. 425.

See 2 Stra. 900. S. C.

* P 139

170. 1 *Sid.* 40. S. C. 1 *Keb.* 19. *Style* 88. *Salk.* 195. By theſe books it appears that *Roman* figures in pleading and indictments were not good when the proceedings were in *Latin*; and though the late act of 6 *G.* 2. *c.* 14. makes an alteration in that part of the preceding act of 4 *G.* 2. *c.* 26. which requires all words to be written at length, yet as it only allows of figures where they were commonly uſed before, they ought not to be uſed here. (3) In this indictment there is no addition of the defendant's myſtery or degree, as is required by 1. *H.* 5. *c.* 5. *Style* 26, 109, 394. 2 *Hale's Hiſt. P. C.* 176. *Danv. Abr.* 237. *King* and *Bowes*, *Eaſt.* 5 *G.* 1. Motion by Mr. *Raby* to quaſh an indictment for keeping a gaming-houſe, becauſe there was no addition to the defendant's name; and quaſhed accordingly. But in the preſent caſe the defendant could not, by the courſe of the court, apply to have this indictment quaſhed, it being for a nuiſance. (4) As the river *Thames*, where the nuiſance is committed, is an highway, the *terminus a quo*, and *terminus ad quem*, ought to have been ſet out: For the court is not to take notice that this river runs from ſea to ſea. 2 *Roll.* 81. *pl.* 18. 1 *Keb.* 286. (5) The names of the jurors are not here returned, nor does it appear that there were twelve of them, the words being, "on the oaths of good and lawful men." 2 *Hale's Hiſt. P. C.* 167.

In anſwer to theſe objections it was urged, (1) That it ſufficiently appears by the ſtyle of the preſentment, and by what the court will judicially take notice of, by what authority the court of conſervancy was held; and alſo that the mayor of *L.* hath a juriſdiction in the preſent caſe. By the 17 *R.* 2. *c.* 9. the juſtices of peace are impowered to have the conſervation of all rivers within their reſpective counties, and a juriſdiction is thereby erected

erected in the mayor or warden of *London* to have the conſervancy of the river *Thames* from *Staineſbridge* to *London* and in the water *Medway*: And by the
* P 140 ſubſequent act of 4 *H.* 7. *c.* 15. (*Raſt. Statutes* 197.) the juriſdiction of the mayor is enlarged. 4 *Inſt.* 250. Now the act of *R.* 2. is plainly a publick law, whereof the court will take judicial notice, (according to *Holland*'s caſe in 4 *Co.* 76.) as a juriſdiction is thereby given to all the juſtices of peace throughout the kingdom; and though the other part of the ſtatute is confined to a particular part of the realm, yet the
10 Co. 57. b. 2 Roll. 466 court will take notice of the whole clauſe. The court will alſo take notice of the cuſtoms of the
V. ante 8. poſt. 304. city of *London*, they being confirmed by act of parliament; and by force of theſe this court of conſer-
(*b*) 10 Mod 338. Stra. 462. vancy was held. *Co. Entr.* 535. 1 *Roll.* 557. *pl.* 6. *Stow's ſurvey of London. Fazakerly* and *Wiltſhire* (*b.*) It is alſo ſufficiently plain that the court was held at a place where the mayor of *London* has a juriſdiction, it being expreſly mentioned to be "at *Fulham* "within the county of *Middleſex*," where too the the nuiſance is ſaid to be committed: For this court will take notice, that *Fulham* lies on the banks of the *Thames* within the county of *Middleſex*, as this appears by the 12 *G.* 1. *c.* 36. and 1 *G.* 2. *c.* 18. which are made publick acts. Beſides, there is no need in this caſe to ſtate by what authority the court is held: For where a proceeding originally inſtituted in an inferior court is brought up here, no objection can be taken in this court but what would have been a good one in the court below, becauſe it is only returned how it ſtands there. Now it is certain that this matter could not have been objected below, becauſe the judge, and every one there, muſt be ſuppoſed to know by what authority the court is held. 1 *Roll. Rep.* 106. *Hetl.* 158. *Hob.* 86, 87. And therefore this caſe is very different from thoſe where a juriſdiction is brought in queſtion in another court, to juſtify any act done under it; in which

which laſt caſes it is (to be ſure) neceſſary to ſet it out. It was farther ſaid, that all the precedents are in this form: And a ſearch having been made, the following were found and produced, all of them being in the ſame ſtyle and words with the preſent caption. *Queen* and *Coppen*, *Mich.* 5 *A.* In that caſe (as appears by the minute book) there was a demurrer to the preſentment; and after argument by * *Raymond* on the one ſide, and the recorder of *London* on the other, the proſecutor had judgment. *Queen* and *Coppen*, *eodem termino.* Demurrer, and judgment for the proſecutor. *King* and *Smith*, *Trin.* 6 *G.* 1. *King* and *Smith*, *eodem termino.* *King* and *Browne*, *Mich.* 5 *G.* 2. *King* and *Browne*, *eodem termino.* *King* and *Watts*, *Trin.* 6 *G.* 2. *King* and *Watts*, *eodem termino.* *King* and *Delannet*, *eodem termino.* All the preſentments being therefore in this manner, (ſuppoſing that the exception is in itſelf material,) yet as it is *communis error*, it is too late now to allow it; for if it be, all the former preſentments will be overturned. In the caſe of the corporation of *Bewdley*, (*c*) (which was upon a *ſcire facias*) it was objected, that it was not a caſe within the *venire* act, whereby the jury are required to come *de corpore comitatus*, it being neither a ſuit or action: And it was held, that if that had been the firſt inſtance, the objection would be a good one; but all the precedents in the crown-office (which were not above ſix or ſeven) being in this manner, the court diſallowed the objection, becauſe it would overturn all the former proceedings. And the ſame argument is uſed in *Rawlyns's* caſe, 4 *Co.* 53. *b.* 54. *a.* (2) Before the late acts of parliament for turning the proceedings into *Engliſh*, *Roman* figures might be uſed in indictments, becauſe this was agreeable to the 36 *E.* 3. *c.* 15. 1 *Vent.* 256. *King* and *Yeomans*, *Paſch.* 11 *W.*

* P 141

(*c*) 1 P. Wms. 223. ante 117.

11 *W.* 3. in *K. B.* [of which caſe, *Bootle* ſaid, he had a manuſcript report.] There, in the caption of the indictment, the year of our lord was expreſſed in common *Engliſh* figures [1697,] and it was held ill: But the report ſays, that if it had been in *Roman* figures, it would have been very well.* The queſtion then is, what alteration is made by theſe late acts. Now by the firſt of them it is enacted, that the proceedings ſhall be in ſuch a common legible hand and characters as acts of parliament are uſually ingroſſed in: And it is common for acts to be in figures. And the laſt ſtatute was made to obviate all objections of this nature; and by this, what was good before in *Roman* is now good in common figures. As to *Hale's Hiſt.* 170. cited *contra*; what is there ſaid relates *not to criminal but to capital caſes, as appears by the head of the chapter. (3) This is a cauſe out of the ſtatute of additions; for that act relates only to ſuch proceedings whereon outlawries are founded; but this being only a preſentment in a court of conſervancy, no proceſs of outlawry lies; for if the defendant does not appear, he is fined; and if he appears and is found guilty, judgment is given to abate the nuiſance, and the party is fined, and the fine eſtreated into the Exchequer. The word [indictment] comes the neareſt to this caſe of any uſed in the act, but that does not include it. But ſuppoſing an addition to have been neceſſary, yet the want of it is cured by the appearance of the defendant, all one as in the caſe of a miſnomer, and for the ſame reaſon: For the reaſon of an addition is, that one perſon may not be arreſted or outlawed inſtead of another, and ſo it appears by the act itſelf; but if *conſtat de perſona*, that ſuch an one is meant, and he confeſſes it, the reaſon intirely ceaſes. 2 *Roll. Rep.* 225. S. C. *Cro. Jac.* 610. 1 *Keb.* 885.

* S. P. as to an inquiſition by a Coroner. *R. v. Philips* Stra. 261.

* P 142

885. S. C. 1 *Sid.* 247. *Comb.* 70. *Witherington* and *Charleton.* (*d*) In an appeal *de morte viri* by the wife, it was held that the want of the words [*de morte viri ſui*] in the *exigent* was cured by the appearance of the party. Here alſo there has been a general imparlance, for the appearance is of *Eaſter* term, and ſo it paſſes on till *Trinity* term; whereas it ſhould have been a ſpecial imparlance, (which is very common, and the form of which is in 7 *H.* 6. 39.) and the defendant thereby might have ſaved all advantages, and guarded againſt this eſtoppel: But by this imparlance the objection is waived. 35 *H.* 6. 36. *Keil.* 93. 1 *Lutw.* 22. 1 *Vent.* 236. 2 *Keb.* 134. Beſides, the defendant ought to have taken advantage of this matter, either by way of exception, (2 *Hale's Hiſt. P. C.* 175, 176.) or elſe by plea in abatement: The ſtatute ſays, the writ, *&c.* ſhall be abated; and there are many inſtances where there have been pleas in abatement, as well where there has been no addition, as where there is a falſe one. *Clift's Entr.* 15, 16. *Reeve* and *Trundal.* (*e*) That was an appeal without any addition, and this was pleaded in abatement, * and held a good way of taking advantage thereof: And the writ was abated, * P 143 and the cauſe tried upon another appeal. This objection therefore, which goes only to the form, and in civil actions enables the party to deſtroy one writ by giving a better, the defendant here cannot avail himſelf of by way of demurrer, there being no ſuch thing as a demurrer in abatement. (4) This being in the caſe of a navigable river, the court is to take notice from whence and where it flows; and in *The King* and *Hammond,* (*f*) *Hil.* 3 *G.* 1. lord chief juſtice *Parker* ſaid, that the court is to take notice that highways in an iſland go from the ſea on the one ſide to the ſea on the other. In this caſe, if it flows to *Fulham* it is ſufficient. And all the precedents are in this manner As to the laſt objection, it appeared on producing the record that the jurors names

(*d*) Ante 68.

(*e*) 2 Hawk P. C. 190. Comyns Rep. 257, Stra. 402.

(*f*) 10. Mo. 382. Stra. 44.

names were there inſerted to the number of twelve. And the maſter of the crown-office ſaid, that it was uſual to omit the names in copies for the ſake of brevity. This objection therefore fell of courſe. [And ſerjeant *Wright* gave up the fourth objection, on the authority of the ſaid caſe of *The King* and *Hammond*, where it was over-ruled.]

It was replied, amongſt other things, in ſupport of the three firſt objections, (1) That though the ſtatutes relating to the conſervancy be to ſome purpoſes public acts, yet the court cannot take notice what juſtices have a power under them; nor do they make the mayor of *London* conſervator of all the rivers in *England*; but, on the contrary, his authority appears thereby to be a limited one: Whereas here it is ſet out to be general, as to the *Thames* and *Medway*. And as to the cuſtoms of *London*, there is no cuſtom here alledged. The queſtion only is, whether the courts of the city of *London*, in returning their proceedings ought not to ſhew their authority. And as to this point, there is no difference between theſe and other inferior courts. *Pulton de pace regis* 176. *pl.* 22, 31. *Stamf. P. C.* 96. *H. P. C.* 207. In the caſe of an indictment the juriſdiction ought to be ſhewn in the caption, as this is no part of the proceedings below, and is a thing very material.
* P 144 *2 *Hale's Hiſt.* 165. And as to the precedents which have been produced, it doth not appear that this exception was there taken: And if the mayor has uſurped ſuch an authority, it is time to put an end to it. Upon the whole therefore, this appears to be an indictment *coram non judice*. (2) The queſtion under this exception is, whether before the late acts, *Roman* figures in indictments were good. They certainly were not. In the caſe cited of *The King* and *Yeomans*, the figures were in the caption, which is

is only a return; but here they are in the body of the preſentment. As to the late ſtatutes, they leave the matter as it was before. Neither of them was made to introduce figures, where they were not before uſed, but rather to reſtrain them. (3) This is a caſe within the ſtatute of additions, as every preſentment, or accuſation is in the nature of an indictment. And it cannot be objected with any force, that this defect is cured by the party's appearance, becauſe without an appearance it is impoſſible he ſhould take advantage of it. Indeed if he appears and pleads to the iſſue without taking any exception, he loſes the benefit of the act; but that is different from a caſe where he demurs. 2 *Roll. Rep.* 225. S. C. *Cro. Jac.* 609. As to what is mentioned about an imparlance, nothing of this kind appears on the record, for there the whole appears to be of *Trinity* term: And the court will not take notice of any thing in the office. Here alſo is a demurrer to the indictment. As to the objection, that this ſhould be pleaded in abatement, and cannot be taken advantage of by a demurrer, there is a difference between the caſes where there is no addition, and where there is a falſe one. In the laſt caſe it muſt be pleaded in abatement, becauſe the indictment, for ought appears, may be good: But in the former the indictment is bad on the face of it, and may be quaſhed on motion. 2 *Hale's Hiſt.* 176. Where there is no addition, the defendant may indeed plead it in abatement, and he may alſo take advantage thereof by demurrer; which being an exception to the whole indictment, it is impoſſible it ſhould make any thing good; for it confeſſes only what *is well ſet * P 145
out. When the books ſay, that there can be no demurrer in abatement, the meaning thereof is, that the party cannot have the effect of ſuch a demurrer, becauſe the court will give final judgment thereon. Beſides, if the matter be extrinſic, the party muſt plead

plead it; but if it be intrinſic, the court will take notice thereof, and even in civil ſuits will abate the writ, (1 *Roll. Rep.* 176.) and conſequently there can be need of a demurrer in abatement. 6 *Mod.* 198. S. C. *Salk.* 220.

Lee C. J. The fourth objection has been given up by the proſecutor's counſel, and not without reaſon; for it was over-ruled in the ſaid caſe of *The King* and *Hammond*, (g) *Hil.* 3 *G.* 1. That was an indictment for a nuiſance in a ſtreet; and it was excepted, that there was no deſcription of the highway by mentioning the *terminus a quo*, and *terminus ad quem*, and 1 *Roll. Rep.*———was cited in ſupport of the objection: But the court held that it was not neceſſary, becauſe highways have no bounds: And C. J. *Parker* cited *King* and *Thomſon*, 10 *W.* 3. where it was ſo determined. (1) It is objected, that in the caption it is not ſet out by what authority the ſeſſions was held; and that it does not appear thereby there is a juriſdiction in the perſon before whom this indictment was taken. To warrant the firſt part of this objection ſome entries have been mentioned, but no caſe has been cited to prove, that in a return to a *certiorari* it is neceſſary to ſet out the inſtrument of conſtitution under which the court is held, or to ſhew whether it be held by charter or cuſtom. I think it is not neceſſary: And with this agrees lord *Hale's Hiſt.* by which it appears, that in returns out of an inferior court, it is ſufficient to ſhew that they have a juriſdiction in the matter returned. * Now this, I think, does not ſufficiently appear in the preſent caſe; for the mayor may be conſervator of

(g) Ante 143.

* Upon a demurrer to an indictment found in an inferior court, objections may be taken as well to the juriſdiction of ſuch court as to the ſubject matter of the indictment. *Rex.* v. *Fearnley*, 1 Term Rep. B. R. 316.

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the rivers *Thames* and *Medway*, as he is here described, and yet have no power to take cognizance of this matter by indictment. This part of the objection therefore seems to be of great weight; but, on the other side, it seems too much to overturn so many precedents as have *been in this manner; and perhaps all of them are so. As to the second objection, there is great weight in it from the authority of the cases that have been cited in support thereof. There is no distinction as to this point between indictments criminal and capital, but the only difference between them is the consideration of the punishment; and therefore the passage cited out of lord *Hale's History* is very material: And he is therein very express, that figures ought not to be used in indictments. The cases in *Styles* 88. 1 *Sid.* 40. S. C. 1 *Keb.* 19. have been also cited, and are material to this point. The case cited *contra* in 1 *Vent.* 256. doth not clash with the opinion of lord *Hale*, because that is in the case of a *venire* in a civil action: Nor is the other, of *The King* and *Yeomans*, strong enough to encounter his opinion, where he is so very express and treats professedly of the subject; for there the figures were not *Roman*, so that the matter did not come in question. The third objection is of very great weight. I think that upon the statute of *H.* 5. the want of addition doth not make the indictment void; but if there be none, the party may except to it. In Sir *Harry Bond's* case, *(b)* 10 *W.* 3. (the report of which I had from a great person who once presided in this court;) he being outlawed for high treason, it was objected to the *exigent*, that it was without an addition: And it appeared upon reading the record that the indictment had none. And the question was, whether if the *exigent* should be reversed, the defendant may

*P 146

(b) 21 Mod. 198. Ld. Raym. 345.

be arraigned upon the indictment; and *Holt* C. J. thought that he could not, for that the indictment was void. But on another day the outlawry being reverſed, lord *Holt* told the defendant, that he might waive this exception, and take advantage of a pardon which he had, for that the indictment was not void; or elſe that he might except to the indictment: But nothing was mentioned by the court about pleading the want of addition in abatement. And Sir *Harry* waived the exception, and pleaded his pardon. We cannot here take notice of any imparlance. If the party pleads to an indictment, it is a waiver of this exception, as it is held *in
* P 147 *Johnſon*'s caſe, *Cro. Jac.* 609. And in 1 *Sid.* 247. *Comb.* 70. it is ſaid, that an appearance cures it: But this is not true, for to be ſure the party may plead it in abatement; and the caſe in *Comb.* is a very ſtrange one, and deſerves no great ſtreſs to be laid on it. There is a great difference between the caſes, where there is a falſe addition, and where there is none. If it be a falſe one it muſt be pleaded, becauſe this is a matter extrinſic, and the party hath complied with the act by giving an addition; and therefore it cannot be taken advantage of otherwiſe than by plea, where the defendant muſt give his true name. But where there is no addition, the court may, upon motion, quaſh the indictment; as was done in *Styles* 26, 109. and in *The King* and *Bowes*, *Paſch.* (*i*) 5 *G.* 2. The queſtion then is, whether there is any difference between a motion to quaſh an indictment for want of an addition, or taking an exception at the bar, (as may certainly be done) and taking advantage thereof by demurrer. It muſt be admitted that there can be no ſuch thing as a demurrer in abatement, for the reaſon mentioned in *Salk.* 220. S. C. 6 *Mod.* 198. But theſe demurrers

(*i*) Ante 139.

murrers for inſufficiency are not to be conſidered as demurrers in abatement. The demurrer is, becauſe the indictment is inſufficient to oblige the defendant to anſwer to the charge; and the court is not to give ſuch a judgment as ſhall finally acquit him, but only that the indictment be quaſhed; and the party is afterwards ſubject to a good indictment. *Vaux*'s caſe, 4 *Co.* 39. *b.* 2 *Hale's Hiſt.* 393. And the law has always been ſo taken. I do not ſee therefore why this defect may not be taken advantage of upon demurrer, all one as *ore tenus* at the bar.

Page juſt. agreed, (1) That if a juriſdiction be ſhewn in the caption it is ſufficient; but that it is not ſufficiently ſet out here: And this is abſolutely neceſſary in returns to a *certiorari*, though it be not ſo in indictments, which are only the act of the jury. (2) That in civil actions *Engliſh* figures are now good, becauſe literal ones were therein uſed before the late acts; but that in indictments * they ought not * P 148
to be inſerted, becauſe it was not uſual, before theſe acts, therein to expreſs numbers in figures. (3) He ſeemed inclined to think that this third objection is a very ſtrong one, but that it cannot be taken advantage of upon demurrer, becauſe the party cannot thereby give the right name.

Probyn juſt. This is in the caſe of a return to this court, which is no part of the proceeding below, and therefore the juriſdiction of the inferior court ought to appear therein. They need not ſhew indeed how they came by their juriſdiction, but they ought to diſcloſe ſo much as gives them a juriſdiction over the fact in judgment: And in the preſent caſe this is not done. Beſides, if it be only a limited authority which this court of conſervancy has, (as it appears to be by the acts which have been mentioned) it is plain that here they have

not acted under it: Which is another objection to the juriſdiction, as it is here ſet out. As to the ſecond objection, no other figures but ſuch as are capital were ever uſed in the bodies of indictments; and theſe were never allowed but only in immaterial parts; but in this caſe a very material part (*viz.* the quantities of brick, *&c.*) is expreſſed in figures. Now this is not aided by the *Engliſh* acts, becauſe theſe leave the matter as it was before. The material queſtion under the third exception is, whether the want of addition can be taken advantage of by demurrer. Now this being in the caſe of a nuiſance, where the court never permits the party to move to quaſh the indictment, but always forces him to demur, it would be very hard to take from him the advantage of an objection upon a demurrer, which would be a good one upon ſuch motion. And as this objection appears upon the record itſelf, it is more proper to be laid hold of by way of demurrer than of plea, which laſt is proper only where the matter is extrinſic. There may too in this caſe be judgment, *quod indictamentum caſſetur*; as appears by *Hale's Hiſt.* As to an imparlance, none appears here on the face of the record; and as it appears thereby that all the proceedings are of **Trinity* term, we muſt take it to be ſo though the margin be to the contrary: And we can admit no averment by any of the officers contrary to the record. As to the fourth objection, *Probyn* juſt. ſaid on the former argument, that the *Thames* is not to be conſidered as a common road leading from town to town, but it is the great river of the kingdom; and the court is to take notice to what and from whence it flows.

Poſt 220.

P * 149

Chapple juſt. I ſhould be glad to conſider, whether on the firſt objection the defendant ought to be diſcharged of this indictment. Where there is an authority,

authority, either by letters patent or act of parliament, the common way is to ſet it out very generally. And I do not know whether the conſervator may not be ſuppoſed to have the power of taking indictments, all one as commiſſioners of ſewers. The ſecond objection is a very ſtrong one, and the caſes are expreſs for the purpoſe. It is very difficult to maintain upon the late acts that figures may be uſed in indictments, it not being uſual to uſe them in ſuch caſes before. As to the third objection, it muſt be admitted that ſuch a judgment may be given on the inſufficiency of this indictment, as that the defendant may be liable to be charged again; but whether he may take advantage of this objection upon demurrer, is the preſent queſtion. Now the ſtatute makes no difference between no addition and a falſe one, as to the manner of taking advantage thereof: And my lord *Coke* in 2 *Inſt.* 670. is of opinion, that in theſe caſes the proceſs, *&c.* is voidable only, and that if the defendant appears and pleads, taking no advantage of ſuch want of addition as the act requires, he loſes the benefit thereof. *Cro. Jac.* 609. 2 *Hale's Hiſt.* 176. A demurrer muſt be taken for a plea, wherein the defendant prays to be diſcharged from the premiſſes; and in this caſe he particularizes no exception for the want of an addition. In 1 *Sid.* 247. (cited for the proſecutor) the words are ſpoken only by *Keyling*; and they ought not to be conſtrued at large, but to mean only, that where there is a general appearance without taking advantage of this exception, this defect is cured. 2 *Hawk. P. C.* 190. It is * P 150
alſo certain, that the want of an addition may be taken advantage of by motion to quaſh the indictment, or by plea in abatement, (1 *Salk.* 5, 759, 705. *Reeve* and *Trundall*, (*k*) and there are great numbers

(*k*) Ante 142.

bers of ſuch pleas in the books of entries. No caſe has been cited where the defendant has had judgment upon the want of an addition; which, if it be a good cauſe of demurrer, one would think would often have happened. In proceedings by original there are many judgments where there has been no addition. There ſeems but little difference between the want of an addition, and where there is a falſe one; for a bad addition is no addition in law. There is to be ſure no ſuch thing as a demurrer in abatement, but judgment muſt be given in chief; and there is, I believe, a caſe in *Salk.* to this point. As to the time, the party may, I believe, demur at any time before judgment, though a plea in abatement cannot be after a general imparlance. Beſides, no imparlance appears upon the record, and we cannot take notice of the margin. The ſecond objection ſeems to me the ſtrongeſt. [*Note*; Upon the firſt argument *Chapple* juſt. was of the ſame opinion as above given by him, as to the third objection, *viz.* that the want of an addition cannot be taken advantage of by demurrer; for which purpoſe he then cited 2 *Hale's Hiſt.* 236, 237, 238, 239. 2 *Hawk. P. C. cap.* 23, 34. And as to the fourth exception, he then ſaid, that in the caſe of a river it is not neceſſary to ſet out the *termini*; and that the court will take notice of the river *Thames.*]

Lee C. J. It ſeems a very nice conſtruction of the words of lord *Coke*, that where he mentions the party's appearing and pleading, he means a demurrer; which is ſuch a kind of pleading, that thereby he prays the availing himſelf of all the defects in the indictment. And though the act makes no difference between a bad addition and none, yet they are different in the nature of the thing; for if it be a falſe

1 Ld. Raym. 21.

falſe one, the party can take no advantage *thereof * P 151
otherwiſe than by plea; but it is not ſo where there is no addition.

The court took time to adviſe: And no final opinion was ever given, there being afterwards a new indictment brought by the proſecutor.

The King againſt *the inhabitants of Markley.*

S. C. Bur. S. C. 120.

A special order of ſeſſions muſt ſtate facts, and not recite evidence. Bur. S. C. 167. 243.

AN order was made by two juſtices for the removal of one *Stephen Briggs*, and his wife and children, from *Callo* to *Markley:* And upon appeal the ſeſſions made a ſpecial order, ſetting out, that "on the examination of *Stephen*, the pauper's father, he gave an account, *&c.*" and then it relates the ſeveral facts which the witneſſes depoſed; and without ſaying that they believe this evidence, or ſtating the facts to be ſo as they are related, the ſeſſions confirm the original order.

And it was now moved by ſolicitor general *Strange* to quaſh theſe orders, becauſe the ſeſſions order contains no ſtate of facts, but only a narration of the evidence. And he took alſo an exception upon the merits.

On the other ſide it was urged by Sir *Thomas Abney* and Mr. *Phillips*, that if the ſeſſions order ann ot be conſidered as a ſtate of facts, yet as it confirms the original order, it is good.

But

But (by the court) no judgment can be given upon this order; for the juſtices are to determine the facts, and not to refer a cauſe to this court upon the evidence, a ſpecial order being like a ſpecial verdict: And the common form of orders is, "Whereas it appears to us, *&c.*"

By conſent therefore both orders were ſet aſide in order to have others.

Eaſter

*Eaſter Term,

*P 152

11 Geo. II. 1738.

Sir *William Lee*, Chief Juſtice.

Sir *Francis Page*,
Sir *Edmund Probyn*, } Juſtices.
Sir *William Chapple*,

The King againſt *Harwood*.

S. C. 2. Stra. 1088.

MOTION by Sir *Thomas Abney*, that the appearance of the defendant, who was a juſtice of peace, and found guilty upon an information of convicting a perſon without ſummons, might be diſpenſed with, on the clerk in court his undertaking for the fine on the giving judgment. And he warmly inſiſted on this being granted as a motion of courſe, without any affidavit, though the defendant lived in town: And he ſaid, that he was informed by ſome of the clerks in court, that in caſes where no corporal puniſhment is to be inflicted, this is never refuſed.

It is not a matter of courſe to diſpenſe with the defendant's preſence upon giving judgment, where no corporal puniſhment is to be inflicted. See Salk. 56. 40.

But

But the court refuſed the motion as a matter of courſe. And *Probyn* juſt. ſaid, that in the preſent caſe it might be very proper for the defendant to be preſent in order to receive the cenſure of the court, and alſo its advice as to his future behaviour. However, *Lee* C. J. being abſent when this point was firſt ſtirred, leave was given to move it again when the court ſhall be full.

* P 153 *And on another day, the court being full, this was accordingly moved again as a motion of courſe, without any affidavit; but it was unanimouſly refuſed. And *Probyn* juſt. (who was always ſtrongly againſt the motion) ſaid, that the clerks, who informed the defendant's counſel it was the practice to grant ſuch motions as of courſe, where guilty of a breach of duty.

Doe

Doe againſt *Roach*.

See Caſ. T. Hardw. 373. Bull. N. P. 88.

DEBT upon a recognizance; the condition whereof on *oyer* appeared to be, (after reciting that the plaintiff had obtained a judgment in ejectment in this court againſt the defendant, which was afterwards affirmed in the Exchequer chamber, and that a writ of error was brought thereupon in parliament, and then pending) that in caſe the ſaid judgment ſhall be affirmed, if the defendant ſhall pay unto the plaintiff all ſuch coſts, damages, ſum and ſums of money, as ſhall be awarded upon or after affirmance of the ſaid judgment, then, *&c.* And the defendant pleads, that after acknowledging the ſaid recognizance, and before the bill brought, no coſts or damages were awarded, *&c.* To this the plaintiff replies, that the judgment mentioned in the condition was affirmed in parliament, and that the plaintiff did thereupon recover againſt the defendant 60*l.* for coſts and damages, and aſſigns for breach the non-payment of the ſaid ſum. And hereupon the defendant demurs.

Under a recognizance on error to the Houſe of Lords, on a Judgment in ejectment, with condition to pay all ſuch coſts, damages and ſums as ſhall be awarded upon or after the affirmance, the defendant is liable for the coſts and damages awarded by the Lords, without any writ of Inquiry.

It was now argued by Mr. *Deniſon* for the defendant, that the breach aſſigned in the replication is not a good one, becauſe the coſts given by the houſe of lords are not ſuch as the defendant is bound to pay by his recognizance. He is obliged to pay ſuch coſts only as are mentioned in the ſtatute of 16, 17 *Car.* 2. *c.* 8. And by force of this act, no judgment

*P 154 ment can be given on the affirmance *of a judgment in ejectment for coſts or damages, until a writ of inquiry be executed; nor can any other court give coſts beſide that out of which the execution goes. And although in this caſe the houſe of lords hath given coſts, yet theſe the plaintiff may and ought to releaſe; and this court is bound, by the words of the ſtatute, which are [ſhall award], to grant a writ of inquiry, and then give coſts afterwards. The other acts relating to coſts are the 3 *H.* 7. *c.* 10. (which extends to all actions), and the 13 *Car.* 2. *ſeſſ.* 2. *c.* 2. by both which the party recovered coſts for the delay of execution: And the meaſure the court went by as to theſe was by conſidering what intereſt accrued due during the pendency of the writ of error. 1 *Salk.* 208. But this caſe relating to land was left and remained unprovided for, until the 16, 17 *Car.* 2. which is introductive of a new law, and a repeal of the former ſtatutes. On this ſide were cited. *Yelv.* 75. *Carth.* 180. *Mordaunt* and *Thorold*, *Carth.* 133. S. C. 1 *Salk.* 252, S. C. 3 *Lev.* 275. S. C. 1 *Show.* 97. (in which caſe no judgment is given for coſts on the affirmance of the judgment) *Kent* and *Kent*, (*a*) *Eaſt.* 7 *G.* 2. in this court. A writ of dower was brought in the Common Pleas in *Ireland*, and a judgment obtained for the demandant; whereupon a writ of error was brought in the King's Bench there, and the judgment affirmed, and judgment was alſo given for damages and coſts. But error being brought here, it was held, that the judgment of the King's Bench in *Ireland* for the damages and coſts was erroneous, for that they could not give ſuch judgment by 16, 17 *Car.* 2. till after the execution of a writ of inquiry: And it was alſo reſolved that this court could not give coſts, becauſe the record was not compleat; and that the

(*a*) 2 Stra. 971. Caſ. T. Hardw. 50. 2 Kely. 194. 2 Barnard 357. 386. 431.

the King's Bench in *I.* muſt award a writ of inquiry, and then give coſts. And *Deniſon* ſaid, that the only entry of proceedings upon this ſtatute, in print, is *Trin.* 7 *W.* 3. *Roll.* 496. cited in *Modus intrandi*, (a book of ſmall authority): And there a writ of inquiry is awarded after a *non proſ.* and afterwards judgment given for coſts and damages. And in *Lill. Entr.* 271. (where the roll is rightly mentioned, and which * caſe is reported in many books) there is no * P 155
mention of any coſts.

On the other ſide it was argued by ſerjeant *Parker*, that it is not proper for this court to controul the judgment of the houſe of lords, who have thought it right in this caſe to give coſts. But however, there is no foundation for this objection on the 16, 17 *Car.* 2. for the third ſection of this act relates to ſuch coſts as are given by 3 *H.* 7. and the coſts given thereby are on affirmance of the judgment; and theſe there is no need to aſcertain by writ of inquiry. Otherwiſe it is where the party proceeds for the recovery of damages for waſte committed, or for the meſne profits; in which caſes a writ of inquiry is indeed neceſſary by the fourth ſection of *Car.* 2. In the caſe cited of *Kent* and *Kent*, the meſne profits were aſcertained, and not the coſts, without a writ of inquiry. Beſides, as the defendant voluntarily entered into this recognizance, the court is only to regard the condition of it, as it is ſet out in the record, without taking the act into conſideration; and the condition is, for the payment of "all ſuch coſts, *&c.* as ſhall "be awarded upon or after the affirmance of the "judgment." *Leſſer* and *Johnſon*, (*b*) *Hil.* 13 *Geo.* 1. (*b*) 2 Stra. 745. 2. Ld. Ray. 1459.
A *ſcire facias* was brought on a recognizance given for the payment of coſts in an action againſt an executrix; and in error on the award of execution thereupon,

And it was aſſigned for error, (1) That this is not a proper action; but it ſhould have been an action of covenant, and not of debt: For although an action of debt lies for a certain ſum which is covenanted to be paid, yet otherwiſe it is where the ſum is uncertain, and depends on a contingency. The ſtrongeſt caſe of this kind is in *Cro. El.* 561, 758. but there the court was divided, and it doth not come up to the preſent. (2) The plaintiff below hath not well and ſufficiently aſcertained how long the ſhip was out, or how much became due: For if the computation is to be made according to the times mentioned in the declaration, the time amounts to eleven calendar months and ſome days over, and the ſum to 601*l.* and odd money: Whereas the computation here ſeems to be by lunar months, which is contrary to the charterparty. It ſhould have been averred, that the ſhip was out for ſuch a particular time. (3) The verdict is imperfect and bad; the ſum demanded being 500*l.* and the finding of the jury extending only to 357*l.* 11*s.* part thereof, without ſaying any thing of the remainder, of which the defendant ought to have been acquitted. The jury are ſworn to give a verdict on the whole matter in queſtion: And this being in debt, they ought to find the whole, or elſe the writ is falſified. *Co. Lit.* 227. *a.* *Cro. El.* 133. 1 *Roll.* 802. *pl.* 5. *Cro. Jac.* 31, 113. 3 *Lev.* 55. *Cattle* and *Andrews*, *Hil.* 5 *W.* 3. *Roll.* 826. reported in 3 *Salk.* 372. (a book of ſmall authority) the record of which caſe agrees with the report. (4) As the judgment here is * "for the ſaid "debt," this cannot be underſtood of the 357*l.* 11*s.* which is found unpaid, becauſe this is only part of the plaintiff's demand; but it muſt be applied to the 500*l.* which is the ſum demanded; and conſequently the judgment is not warranted by the verdict. If the finding ſo much unpaid implies payment of the remainder,

* P 158

remainder, which is contrary to the caſes before cited, the plaintiff ought to have judgment only for ſo much as is unpaid. It was alſo ſaid by the plaintiff's counſel, that here there cannot be a *venire facias de novo*; and ſo it is ſettled in *Saunders's Reports*, and lately reſolved in this court.†

† *Qu.* 2. Strn. 1055. but See 2 Term Rep. B. R. 126, n. a. and the caſes there cited.

On the other ſide it was argued, (1) That the ſum here demanded muſt be taken for a penalty; for the declaration begins in debt, and concludes accordingly: And conſequently this is a proper action. Beſides, it is a general rule, that where a demand ariſes on a deed, an action of debt as well as of covenant will lie; and it is not neceſſary for the ſum to be ſtipulated by the deed, but if it be reducible to a certainty, it is ſufficient. Now in the preſent caſe the defendant agrees to pay 52*l.* 10*s.* *per* month, as long as the ſhip is out on the voyage; and therefore by averring how long the ſhip was out, *ſatis conſtat* how much exactly is due. And here the money is actually aſcertained. *Cro. El.* 561, 758. 1 *Roll.* 591, 597. *Style* 31. 3 *Lev.* 429. (2) Although the plaintiff is miſtaken in his computing by lunar months, yet as it is ſhewn that the ſhip was out for ſo many calender months, the declaration is ſufficient, eſpecially as no advantage was taken of this miſtake by plea, but it was thereby admitted to be right. Beſides, in the plea, replication and verdict, calendar months only are mentioned; ſo that there is an intire conſiſtency between theſe and the deed. (3) This verdict is ſufficient: For the ſum demanded, as is ſaid before, being to be conſidered as a penalty, if any part of the debt is unpaid, the whole penalty is forfeited; and the plea in this caſe is not true, that the defendant paid all that was due according to the rate. Beſides, the ſpecial iſſue here being, whether the defendant paid all the money *due on the charterparty, it ſeems to be a full determination of this matter, for

* P 159

the jury to find that ſo much is unpaid. That a jury may ſever a debt, appears by *Salk.* 664. And if the ſubſtance of an iſſue is found, it is ſufficient. *Co Lit.* 227. *a.* 9 *Co.* 67. 112. *a.* *Yelv.* 148. *Hob.* 55. (4) The judgment is, that the plaintiff do recover "his ſaid debt;" and this is found to be 357*l.* 11*s.* which is the laſt antecedent, and to which therefore thoſe words muſt refer. If indeed it had been ſaid, "his debt of 500*l.*" the judgment would have been ill: But in ſuch caſe this court would not have been obliged to reverſe the judgment for the whole; but they might ſever it, as it appears how much is due, and give ſuch judgment as the plaintiff appears to be intitled to on the face of the whole record.

But the court ſeemed now to be unanimouſly of opinion, that the objection to the verdict is inſuperable; for that a jury muſt determine on the whole fact, and here part of the ſum demanded remains undiſpoſed of. And (they ſaid) that there is no difference between this and the caſes which have been cited for the plaintiff in error; particularly that in *Cro. El.* 133.

However, the caſe was adjourned for conſideration. And on another day in this term *Lee* C. J. declared the clear opinion of the whole court to be, that the verdict is ill, becauſe it doth not take in the intire matter in iſſue. And for this error only, without giving an opinion upon the other objections, the judgment was reverſed.

Note; Upon the firſt argument of this caſe it ſeemed to be agreed by the court, (*Lee* C. J. *abſente*) (1) That this is a proper action, as the demand ariſes on a ſpecialty, and the ſum is aſcertained: And it is like

like the caſe of rent due by deed. (2) That taking the averments together, it ſufficiently appears how much was due, the time being particularly mentioned. And (by *Page* juſt.) although there be a miſcalculation, the court may ſet it right. And * ſo in the common caſe, where a jury finds ſo much for damages, and ſo much for coſts, and then miſtakes in the caſting up, this is not material. (3) That the verdict is imperfect. And the ſum demanded cannot be looked on as a penalty, as it appears to be due out of a greater ſum, *viz.* 652*l.* 10*s.* But *Page* juſt. ſaid, if the minutes be right, and it be a miſtake in the *poſtea*, the court may perhaps permit it to be amended on application. (4) That the judgment is ill; for that the words [his ſaid debt] muſt go to the ſum demanded. And *Page* juſt. ſeemed now to be of the ſame opinion as to the judgment. * P 160

Note alſo, that on the laſt argument of this caſe, it was admitted by ſerjeant *Parker*, who was counſel for the plaintiff in error, that the firſt objection is not maintainable.

Toe againſt *Adlam.*

Stating that the Jurors were ſworn *to the truth* of, &c. without ſaying "*to ſpeak the truth*" is error. In an inferior court, upon the iſſue whether the cauſe of action accrued within the juriſdiction, the Jury find that the defendant did not promiſe in manner and form as the plaintiff hath complained" This Verdict is bad. *Semb.*

ERROR of a judgment in an action brought in the *Whitechapel* court, upon an *indebitatus aſſumpſit*, for work and labour done. The defendant below pleaded, that the cauſe of action accrued to the plaintiff out of the juriſdiction of the court, *viz.* in parts beyond the ſea. The plaintiff replied, that the cauſe of action accrued within the juriſdiction, *&c.* Upon which a *venire facias* is awarded to recognize, whether the defendant "did undertake in "manner and form aforeſaid." And a verdict is given, that the defendant "did not promiſe in manner and form as the plaintiff hath complained."

And it was now aſſigned for error by Mr. *Deniſon*, (1) That the ſwearing of the jurors is not well alledged, the entry thereof being in theſe words, "Whereupon the jurors aforeſaid to the truth of the "premiſſes [without ſaying, "to ſpeak the truth"] "being elected, tried and ſworn, ſay upon their oaths, *&c.*" Now by this it *does not appear that the jury were elected, *&c.* to give a verdict; and as the word [*dicendum*] is omitted, it is nonſenſe. 1 *Roll.* 766. 2 *Lev.* 83. in point. (2) It was objected, (by ſerjeant *Draper* laſt *Trinity* term, when this caſe was firſt ſtirred, and now by Mr. *Deniſon*) that the *venire* and verdict are not agreeable to, and *ad idem* with, the iſſue. For the matter here in diſpute is, whether

*P 161

ther the work was done, and the promiſe made, within the juriſdiction, both which are neceſſary in theſe caſes: But the words, that the defendant "promiſed "*modo & forma*," relate to the merits of the cauſe only, and not to the circumſtance of place; which if they do, there is no need in theſe caſes of a plea in abatement. If the words include the place as to the promiſe, yet as to the work and labour done, which is the cauſe of action, the verdict is plainly defective, it being only found that the defendant promiſed *modo & forma*; ſo that it remains as doubtful as before, whether the work was done within the juriſdiction.

On the other ſide it was argued by Mr. *Benny*, (1) That though in the *Latin* the words "*jurati ad veri-*"*tatem*" are nonſenſe, yet the words "being ſworn "to the truth," without adding "to ſpeak", are well enough in *Engliſh*, the ellipſis being uſual in the idiom of this language. 1 *Roll.* 767. *pl.* 7. 798. *pl.* 6. *Comb.* 398. (2) The matter contained in this verdict could not have been found, unleſs it had been proved at the trial that the promiſe and labour, which are the cauſe of action, were made and done within the juriſdiction; this being abſolutely neceſſary to be ſhewn, according to the caſe of ——— and *Peacock*. (*a*) And the verdict extends to and takes in the whole iſſue: For being the ſaying of lay-gents, it is to be conſtrued according to a reaſonable and favourable intendment. *Hob.* 54, 262. *Comb.* 426.

(*a*) *Peacock v. Bell & Kendal* 1 Saund. 74.

But the whole court were clearly of opinion, that the firſt objection is fatal, and is fully warranted by 1 *Roll.* 766. which is in point, the objection being the ſame now as it was before the proceedings were in *Engliſh*. And, as *the C. J. ſaid, it is abſolutely neceſſary to ſet forth, that the jury were ſworn to

* P 162

ſpeak

ſpeak the truth, or, in other words, to give a verdict, in order to ſhew that they were properly qualified: And this eſpecially in inferior juriſdictions. But, according to what is here mentioned, the jury might be ſworn no farther than not to ſay any thing againſt or contrary to the truth.

The whole court alſo declared, that the other objection is a very material one; for the iſſue comprehends both the promiſe and the labour; whereas the words of the verdict do not refer to the place where the promiſe was made, much leſs to that where the labour was done; ſo that the point in iſſue remains undetermined. And upon theſe actions brought in inferior juriſdictions, it is neceſſary to ſhew that the thing for which the promiſe is made was performed within the juriſdiction. And in ſupport of this objection, the C. J. cited *Cro. El.* 730.

But upon the firſt objection only the judgment was reverſed.

The

The King againſt *Bunce.*

Indictment for carrying about a perſon infected with the the ſmall pox, quaſhed.

IT was moved laſt *Hilary* term by ſerjeant *Huſſey*, to quaſh an indictment againſt the wife of one *Bunce*, for carrying a perſon having the ſmall pox from one pariſh to another, upon the following exceptions: (1) It is ſaid in the indictment, that the jury "did preſent," inſtead of "do preſent." (2) The indictment is, that defendant left the party infected at the houſe of *N. Wood* "in the city of "*Exeter*;" whereas it ſhould have been ſaid, "within "the city and county of *Exeter*:" The city of *E.* and the city and county of *E.* being not coextenſive. (3) It is not mentioned that the defendant knew that the perſon conveyed had the ſmall pox. (4) The fact is not averred to be with an ill intent, as to charge the pariſh *where the party was ſent, &c. A rule to ſhew cauſe, &c. was thereupon granted. And ſerjeant *Draper* for the proſecutor now giving the matter up, the indictment was quaſhed.

* P 163

The

S.C. 2 Stra. 1090.

The King againſt *Liſle.*

In order to conſtitute a mayor *de facto*, it is neceſſary that there be ſome form or colour of an election; without this, the taking the title and regalia of office, and the acting and being ſworn in, are not ſufficient. An officer *de facto* may do ſuch acts as are neceſſary for the good of the corporation, but not arbitrary and voluntary acts. *Ante* 122, 124.

A *Quo warranto* was brought againſt the defendant for acting as burgeſs of *Chriſt-church* in the county of *Southampton*; to which he pleaded, (after admitting the conſtitution of the ſaid corporation to be as it is ſtated in the information) that an aſſembly was convened by one *Goldwire*, mayor of the ſaid borough, at which he was nominated by the ſaid *Goldwire*, and elected by the majority of the burgeſſes who were preſent, a burgeſs; and that afterwards he was admitted and ſworn into the office. Upon this plea ſeveral iſſues were taken, *viz.* whether *Goldwire* at the time of the nomination and election of the defendant was mayor; and whether the defendant was admitted and ſworn into the office, with three other iſſues. A ſpecial verdict was found on ſome of the iſſues; and as it appeared by this verdict, and by the finding on the other iſſues, and the pleading, the caſe was in effect this:

The town of *Chriſt-church* is a corporation by charter, and power is thereby given to the mayor and burgeſſes, or the major part of them, "at their "will and pleaſure to chuſe as many burgeſſes as "they ſhall ſee occaſion," the mayor being to nominate. And it was found, that *Goldwire* never was elected mayor of the ſaid borough, nor had any right or title to the ſaid office, but notwithſtanding this, the 16 *October* 1736. "under pretence and colour "of being elected mayor," he was preſented unto

William

William Willis, ſteward of the court-leet, and was there ſworn into the office of mayor, and in fact exerciſed the office till ——— day of ——— 1736. And the ſaid *Goldwire* being in the exerciſe of the ſaid office, " and under *pretence of being elected " and ſworn into the ſame," he iſſued out a ſummons to the ſeveral burgeſſes of the corporation to meet together on a day not mentioned in the charter; at which time an aſſembly was accordingly held, in which *Goldwire* preſided, but ſome of the burgeſſes refuſed to come, and others who were preſent proteſted againſt the legality of *Goldwire*'s being mayor, and againſt the nomination of the defendant; and notice was given to the defendant that *Goldwire* was not mayor: Notwithſtanding which he was nominated by *Goldwire* for burgeſs. It was alſo found, that a *quo warranto* had been recently proſecuted againſt *Goldwire* for acting as mayor, pending which he ſummoned and held the aſſembly as aforeſaid; and that there was afterwards judgment of ouſter againſt him; and the jury ſet out the whole proceedings, and alſo the ſpecial verdict found in that cauſe *in hæc verba*: By which it appeared, amongſt other things, that according to the conſtitution of the ſaid borough, the mayor is to be ſworn in at the next court-leet after his election, and is to continue in his office for the year after his being choſen, and until another is elected; and that one *T. Jeanes* was duly elected mayor *anno* 1735. and that *Goldwire* was never choſen mayor, nor ſworn into the office. * P 164

The principal queſtions in this caſe were, (1) Whether it appears upon this record that *Goldwire*, who convened and preſided at the aſſembly when the defendant was elected, was a mayor *de facto*. (2) Suppoſing that he was a mayor *de facto*, whether

ther he had the power of convening and preſiding at a corporate aſſembly; and whether the nomination and election of a burgeſs at ſuch an aſſembly be good.

It was argued laſt term by Mr. *Gundry* on the part of the crown, and by ſerjeant *Burnet* for the defendant; and this term by ſerjeant *Eyre* for the crown, and by ſolicitor general *Strange* (by his Majeſty's permiſſion) for the defendant.

*P 165 *And it was argued for the crown, (1) That *Goldwire* was not ſo much as a mayor *de facto*. For though an officer *de facto* be no where defined in the books, yet it is ſufficiently plain, that in order to conſtitute ſuch an officer, theſe two requiſites are neceſſary; (1) That there be a compleat vacancy; and (2) That there be at leaſt, in all elective offices, the colour of an election; and therefore where there is an officer *de jure* in poſſeſſion, or where without any election a perſon intrudes into an office, he is an uſurper, and all his acts are abſolutely void. *Abbot of Fountain's caſe*, 9 *H.* 6. 32. *pl.* 3. S. C. *Bro. Abbe* and *Prior* 19. S. C. *Non eſt. factum* 3. *Moor* 112, 606. *Cro. El.* 699. 2 *Roll. Rep.* 101, 131. 1 *Lutwt.* 508. *King* and *Sutton*. *King* and *Whitehorne*, 10 *Mod.* 64. Now in the preſent caſe it is found, that there never was in fact any election of *Goldwire* as mayor; and it is to be intended that there was not the leaſt colour of any; for if there had, it ſhould have been ſhewn, that this court might judge, whether it was ſufficient to capacitate him for holding a corporate aſſembly and nominating a burgeſs. It is indeed mentioned, that "under pre-"tence and colour of being elected," he was preſented to the ſteward and ſworn; but the ſwearing him, without a previous election in fact, will not make him a mayor *de facto*: For otherwiſe it will be in

in the power of the ſteward to make as many as he pleaſes. It alſo appears by the proceedings in *Goldwire*'s cauſe, which are ſet out in this ſpecial verdict, that *Jeanes* was mayor *anno* 1735. and that a mayor continues in his office till another is choſen; ſo that there was a rightful mayor *in eſſe* when *Goldwire* intruded into the office; and conſequently he cannot be a mayor *de facto*, it being impoſſible that a politick body ſhould be in two perſons at the ſame time. And it is further ſtated in thoſe proceedings, that *Goldwire* was neither choſen nor ſworn. But (2) Suppoſing that *Goldwire* was mayor *de facto*, yet as he was not a lawful one, the election of the defendant is void. In general this is certain, that there are ſome acts which an officer *de facto* cannot do: *For otherwiſe there will be no difference between officers *de facto* and officers *de jure*. And as an officer *de facto* is a notional creature only, erected by the law, in order to anſwer the ends of juſtice and equity under particular circumſtances, his power ought not to be extended further than what is abſolutely neceſſary for that purpoſe. Now all the acts which an officer *de facto* can poſſibly do are either ſuch as concern the public good, or ſuch as concern third perſons, who have a right to the thing done, or have paid a conſideration for it, or ſuch as are purely voluntary, and to which ſtrangers have no right: And there are ſome acts which the officer is compellable to perform, and others which are voluntary. It is certain, (1) That ſuch acts as tend to the public utility, when done by an officer *de facto*, are valid; and this in order to prevent the interruption of juſtice. 1 *Roll.* 761. 3 *Keb.* 606. 2 *Lev.* 242. Which laſt caſe is contra-

* P 166

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ry to that in *fol.* 184. of the ſame book. [And *Lee* C. J. ſaid, that the caſe in *fol.* 184. is againſt law, and has been always ſo held.] (2) Such acts as concern third perſons, when they have a previous right to the thing done, are good when performed by an officer *de facto*, he being conſidered in ſuch caſes as inſtrumental only. *Co. Lit.* 58. *b.* *Moor* 109. S. C. 1 *And.* 95. 1 *Co.* 140. *b.* 4 *Co.* 24. *a.* *Cro. El.* 699. And ſo it is where a ſtranger has paid or given a valuable conſideration for the thing done. 9 *H.* 6. 32. S. C. *Bro. Abbe* and *Prior* 19. S. C. *Non eſt factum* 3. *Cro. El.* 533. *Moor* 606. S. C. *Cro. El.* 775. 1 *Lutw.* 508. (3) Such acts as are purely voluntary, and are done for the ſake of perſons who have no right to or remedy for the performance thereof, are void: And this too in ſome caſes where a valuable conſideration is paid. *Cro. El.* 699. *Co. Lit.* 58. *b.* 1 *Co.* 140. *b.* 4 *Co.* 24. *a.* (4) Such acts as are voluntary, and which the officer is not compellable to do, are void, eſpecially in the caſe of corporations. To apply theſe rules to the preſent caſe, it is obſervable, that the act here done was not ſuch an one as was neceſſary for the preſervation of the corporation: For it is not found, nor
* P 167 does it appear, that there was any need of *a new burgeſs; but on the contrary it is ſtated, that the mayor and burgeſſes may chuſe ſo many burgeſſes as they ſhall think proper. The defendant paid no conſideration for his election, nor had he any right to it but upon the terms of the conſtitution of the borough: And theſe are, that the mayor and burgeſſes ſhall elect; whereas here it is found, that *Goldwire* was no mayor. This the defendant muſt be conſidered as not ignorant of, as he was a member of the corporation; and he had alſo expreſs notice hereof. It is alſo material that the pretended mayor

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iſſued out a private ſummons; and it was for the meeting of an aſſembly upon a day which was not preſcriptive. This was therefore an act wholly voluntary, and conſequently void, eſpecially as it was performed pending a proſecution againſt the pretended mayor: Who, by the ſame reaſon for which he nominated the defendant a burgeſs, might have made many others ſo too. As to the inconveniencies of the caſe, it appears from what has been ſaid, that none will follow from the diſallowing of this tranſaction in the pretended mayor, and that many will reſult from the contrary. To which it muſt be added that if ſuch acts are good, there is no difference between a mayor *de facto* and one *de jure*, in point of authority; for there is no greater power than that of chuſing members. And by this means the conſtitution of corporations may be overturned, as officers will be hereby encouraged not to adhere to the terms of the charter, and as ſtrangers may be admitted into the body: Whereas the conſtitution of boroughs is part of the conſtitution of the kingdom, and conſequently all incroachments thereupon ought ſtrictly to be guarded againſt. In *The King* and *Sutton*, (*a*) the judges ſeemed to be of opinion, without giving any judgment, that the election of the defendant was not good; and yet *Street*, the pretended mayor, had enjoyed the office for the year, without being ſued in a *quo warranto*; nor was there any iſſue on the record (as there is here) againſt *Street*; but his right was brought in incidentally: Though indeed ſome things were there found which made it doubtful, whether he was a good mayor. In *The King* and *Harding*, *Hil.* 2 *Geo.* 1. a mayor *de facto* preſided at the aſſembly, where the defendant was choſen one of the junior counſellors of the town,

(*a*) Ante. 122.

P * 163

of

of *Nottingham*; and the court were ſo clear of opinion that the election was ill, that the defendant diſclaimed. *The King* and *Bennet, and the corporation of Shaftesbury*, (*b*) *Hil.* 4 *Geo.* 2. The court there agreed, that if the queſtion had been about the mayor's right, and he ſhould appear not to be a good one, his acts would be void. And in the caſe of *The King* and *the corporation of Orford*, in lord C. J. *Hardwicke*'s time, the court was of opinion, that an officer *de facto* could go no further than the doing of neceſſary acts. It was alſo objected by the counſel for the crown, that the word [mayor] in the third iſſue, (*viz.* whether *W. Goldwire* was mayor or not) and alſo throughout the pleadings, muſt mean a lawful mayor, and conſequently the verdict is againſt the defendant, becauſe it plainly appears upon the whole matter ſet out therein, that *G.* was not a lawful mayor: And in pleading, if one ſort of right be ſet out, and another proved, the iſſue will be againſt the party. 2 *Roll.* 680. *pl.* 2. The pleading here is alſo to be conſidered as in oppoſition to the crown. And before the 11 *Geo.* 1. *c.* 4. officers were obliged to prove themſelves to be lawful officers.

(*b*) Strs. 101. S. C. not S. P.

Vid. Bull. N. P. 201. Cas. T. Hardw. 178.

On the other ſide it was argued, (1) That it appears from the facts of which the court can now take notice, that *Goldwire* was a mayor *de facto* at the time of the defendant's election: For though in the record againſt *Goldwire* it be found, that *Jeanes* was mayor *anno* 1735. and that a mayor is to hold over till another be choſen, yet theſe circumſtances are to be thrown out of the preſent caſe, they not being facts found by this jury. All that is found here is the record itſelf, which formerly a jury could not find, (2 *Roll.* 691. *pl.* 1, 5.) and not any of the facts diſcloſed therein. And it is obſervable, that the preſent

ſent jury have found a fact contrary to the record againſt *Goldwire*, *viz.* that he was preſented and ſworn into the office of mayor; whereas by the other record *it is expreſly found that he was not ſworn in: And this is certainly well found, for if one jury be concluded by the finding of a former one, there could be no ſuch thing as an attaint. What therefore is here found is, that *Goldwire* was not well elected, but that, under colour and pretence of ſuch an election, he was regularly preſented and ſworn into the office, (for the regularity hereof is to be intended, 5 *Co.* 97. *a.* S. C. 2 *Roll.* 698. 1 *Vent.* 118.) and that he convened and preſided at a corporate aſſembly, and nominated a burgeſs: Now as here was the colour of an election, and as *Goldwire* had a viſible authority by being ſworn into and executing the office, and this at a time when it does not appear to have been full, he cannot be regarded as an uſurper, who is one that intrudes into an office without the leaſt colour of right. The Abbot of *Fountain's* caſe is therefore on this ſide; for the ſwearing in and executing of an office are at leaſt equivalent with inſtitution and inſtalment. *Dyer* 293. *b.* *Moor* 606. S. C. 1 *Roll.* 476. *pl.* 1. *Cro. El.* 533, 699. *The mayor and burgeſſes of Totneſs* againſt *Bowden*, *Mich.* 10 *W.* 3. in *C. B.* cited by *Denton* juſt. in his argument in *The King* and *Sutton*. Action on the caſe, upon a cuſtom in the corporation of *Totneſs* to grant licences to ſhop-keepers: And it was found, that the borough was incorporated by *H.* 8. and in the time of King *J.* 2. the charter being ſurrendered, he granted a new charter, under which the corporation granted

* P 169

granted the preſent licence; and afterwards the old charter revived: And it was held by all the court, except *Treby* C. J. (who differed) that the corporation was a corporation *in facto*, and the licence well granted. And in *Sutton*'s caſe it was ſcarce doubted, whether *Street* was a mayor *de facto*; and yet there it was found, that another perſon had been duly choſen, and had performed ſome acts of office. As to the ſecond queſtion, it is to be obſerved, that the acts done by *Goldwire* are the ſummoning and holding the aſſembly, (the laſt of which conſiſts only in his being preſent, 1 *Roll.* 514. *pl.* 6, 7.) and alſo the nominating the defendant: For as to the election itſelf, he votes therein as burgeſs; nor does his be-
* P 170 ing mayor *extend his vote further than that of any other burgeſs. Now that theſe acts, when performed by an officer *de facto*, are valid, appears by ſome of the general rules laid down in the books on this ſubject, and which have been admitted by the other ſide. For (1) It is abſolutely neceſſary, to prevent the diſſolution of the corporation, that it ſhould be recruited from time to time by the election of burgeſſes; and the crown has intruſted this borough with the power of chuſing members as they ſhall ſee occaſion. They are therefore judges when a new burgeſs is neceſſary; and by electing the defendant, they have declared that in the preſent caſe it was ſo; and hereby the crown is bound. All that *Goldwire* did in the affair as mayor, was merely miniſterial; and he might have been compelled, by a *mandamus*, to hold an aſſembly for the doing of neceſſary acts; and as theſe are ſuch, they are conſequently valid. 1 *Roll.* 514. *pl.* 6, 7. (2) The acts here done tend to the good of the public, who are ſtrangers, and, as it is admitted, are greatly intereſted in the welfare and preſervation of corporations. (3) Though the act

act of an officer *de facto*, which is collateral to his office, is void, yet such as is merely *ex officio*, (which is the present case) is good. 9 *E.* 4. 6. S. C. *Bro. Assise* 95. *Patent* 21. *Cro. El.* 533. [Which last book shews, that there may be an officer *de facto* and one *de jure* at the same time.] *Moor* 109, 112. *Palm.* 479. *Salk.* 96. 1 *Lutw.* 508. (4) Another rule is, that the act of an officer *de facto*, when it is for his own benefit, is void, because he shall not take advantage of his own want of title, which he must be conusant of; but when it is for the benefit of strangers, who are to be presumed ignorant of such defect of title, it is good; as in the case of a deputy of a deputy. *Cro. El.* 699. cited before. And for this reason the voluntary grant of a disseisor is not valid, because this is for his own advantage, as he has a consideration for it. Now in this case the defendant was a stranger, and no member of the corporation, previous to his election: And it is no more to be supposed that he knew of the want of title in *Goldwire*, against whom there was no judgment of ouster till *afterwards, than the tenant of a manor can be supposed to know the right of the steward. It is also material, that the defendant was obliged to take an oath, which he has actually taken, to serve the corporation; and this is to be regarded as a legal consideration for his place; and he is not on this account only an honorary member. Besides, the public (who, as before mentioned, are interested in the preservation of boroughs) are to be considered as strangers; and there is a consideration moving from them. (5) If the election of the defendant is considered as detrimental to the corporation, yet as it is their own act they are bound hereby, all one as a bond given by a corporation *de facto* will bind them, though

* P 171

they cannot take one for their own benefit. 1 *Lutw.* 508. Upon the whole matter therefore the election is good: And it makes no difference that the pretended mayor was recently profecuted, or that there was a proteſt by ſome of the members; this laſt affecting the mayor in point of puniſhment only; for though the defendant was preſent, he was not obliged to ſcrutinize into particulars, but it was ſufficient for him to ſee *Goldwire* doing acts of office. As to the objection that if this election is good, a mayor *de facto* may mould a corporation as he pleaſes; this is not true: For though he preſides at aſſemblies for the ſake of decency and order, yet he has no greater power in the election of members than any other burgeſs, and is equally bound with what is tranſacted there; and where the aſſembly is held not on a preſcriptive day, as in the preſent caſe, he is obliged to ſummon every individual member: As it was held in the caſe of *Kynaſton* and *the corporation of Shrewsbury*, * (*Trin.* 8, 9 *Geo.* 2.) where the
* P 172 *amotion of a member at an aſſembly held not on a preſcriptive day was determined to be void, becauſe one of the members was not ſummoned: And it

Ante 85. * *Kynaſton* and *the corporation of Shrewsbury*. *Mandamus* to reſtore *Kynaſton* to be alderman of *Shrewsbury*: And by the return and ſpecial verdict it appeared, that by the charter the ſenior alderman is always to be choſen mayor, and that the mayor and aldermen have a power of amotion; that *Floyd* was choſen mayor though *Kynaſton* was then ſenior alderman, he being not reſident in *S.* and that at an aſſembly held by *Floyd* and the major part of the aldermen, ſaid *K.* was amoved, but *T. K.* one of the aldermen, who had a houſe and family in the town was not preſent, nor ſummoned by the ſerjeant at mace, who had his uſual orders; he being informed and believing that *T. K.* was out of town, and therefore he returned him out of ſummons: And held that the amotion was ill, by reaſon of the non-ſummoning *T. K.* eſpecially as he had a houſe and family in town, where a ſummons might have been left. And it makes no difference that it was the negligence of the ſerjeant at mace only. And *per cur'*: Where a corporate act is done by a ſelect number, as on a by-day, every member within ſummons muſt be ſummoned. (A)

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was there alſo agreed both at the bar and bench, that it was a point never determined, whether a mayor *de facto* can preſide at an aſſembly for the amotion of a member; which is much ſtronger than where an aſſembly is held for the chuſing one. Objected, that the word [mayor] in the iſſue muſt mean a lawful mayor; and it is found that *G.* was not ſuch. Anſwer: This might have been a good objection, if the verdict had been general; but as the whole matter is found ſpecially, the queſtion upon this record is, whether he was an officer of ſufficient power to make the preſent election good.

The court (who argued *ſeriatim* on both arguments) were clearly of opinion, (1) That no notice can be taken of the particular facts diſcloſed in the verdict againſt *Goldwire*; but all the uſe which can be made of that record is, that there was a recent proſecution, and afterwards judgment of ouſter, againſt him: So that it does not appear in the preſent caſe there was a rightful mayor *in eſſe* when *Goldwire* acted as ſuch. (2) It was held by the whole court, (except *Lee* C. J. who gave no direct opinion as to this point) that *Goldwire* was not ſo much as a mayor *de facto*. For in order to conſtitute a mayor *de facto*, it is neceſſary that there be ſome form or colour of an election; but without this, the taking the title and regalia of the office, and the acting and being ſworn in as mayor, are not ſufficient: And with this agrees the abbot of *Fountain's* caſe. Now here it appears that *Goldwire* was never elected in fact; and though it be ſtated that he was ſworn at the leet, it does not appear (as it ought) that this was agreeable to the conſtitution of the borough: And it is not material that he acted as mayor, as it is found that a *quo warranto* was recently proſecuted againſt him, pending which the preſent

election was made, and that he was thereupon adjudged to be an uſurper. The conſequence hereof plainly is, that the election is void. And *Lee* C. J.
* P 173 ſaid, that in theſe caſes the proper queſtion is, whether the perſon be an officer *de facto* as to the particular purpoſe under conſideration, according to 1 *Salk.* 96. And he cited *The Queen* and *Davis*, in Queen *Anne*'s time, where on a motion for an information it was held, that there cannot be an officer *de facto* and an officer *de jure* at the ſame time; and therefore the C. J. ſaid, that it would deſerve great conſideration, whether collation by a biſhop *de facto* is good where there is a rightful one in being: As it is laid down in *Cro. El.* 699. (3) By the whole court: Suppoſing that *Goldwire* was a mayor *de facto*, yet the acts here found to be performed by him are not good, becauſe they were not neceſſary for the preſervation of the corporation. In theſe caſes the proper diſtinction is between ſuch acts as are neceſſary for the good of the body, which comprehend judicial and miniſterial acts, and ſuch as are arbitrary and voluntary. The election of the defendant is of the latter kind: For as the number of burgeſſes is indefinite, it doth not appear, nor is it ſtated, as it ſhould have been, that the choice of a burgeſs was neceſſary. It is found too, that the aſſembly was held not on a corporate day, (for which reaſon *Probyn* juſt. ſaid, it ſhould have been ſtated, that notice was given to every member, without which it could not be regular; according to *K.* and
Ante 171. n. *the corporation of Shrewſbury*) ſo that there was no neceſſity of conveying it at that particular time. It is alſo material, that no perſon hath a previous right to theſe offices; nor can the taking of the uſual oath, as has been objected, be regarded as a legal conſideration, becauſe this is ſubſequent to the election, and the party may perhaps refuſe to take it. This caſe

caſe therefore differs from thoſe that have been cited for the defendant; for in thoſe, either the act was ſuch as the officer was obliged or compellable to do, (as in *Palm.* 479.) or ſuch in which a ſtranger was concerned, and had a right to, or paid a conſideration for. In the preſent caſe it ſeems very extraordinary, that one called to an account by the crown for acting as burgeſs, ſhould ſet up a title derived to him from a pretended mayor, whoſe right was litigating * at the ſuit of the crown, at the very time when the other was elected. If ſuch an one hath ſo great a power againſt the crown, there will be no difference between a rightful mayor and an intruder. (4) It was ſaid by *Lee* C. J. and *Page* juſt. that as there was ſo recent a proſecution againſt *Goldwire*, and as the preſent proſecution is by the crown, the iſſue muſt be conſtrued as has been mentioned, *viz.* whether *Goldwire* was a lawful mayor or not.

V. *Rex* v. *Malden* 4 Bur. 2135.2140.

* P 174

After the court had delivered their opiuions as above, it was obſerved by *Probyn* juſt. that the verdict mentions only that defendant was nominated a burgeſs, without ſhewing his election and ſwearing; whereas a nomination only is not ſufficient to make a member: And the court held this alone to be an inſuperable objection to the defendant's title. And the counſel for the crown (who in their argument juſt mentioned this objection) ſaid, that they did not enlarge on it, becauſe they choſe to rely on the merits of the caſe. Judgment for the King.

Garland

S. C. 2 Stra. 1103. ante 27. poſt 291.

Garland qui tam againſt *Burton.*

The court refuſe to quaſh an information *qui tam* for non-reſidence, becauſe it was found before juſtices of aſſiſe, who have no juriſdiction therein. But ſee *Rex.* v. *Williams* 1 Bur. 385. Poſt 220.

MOTION by Mr. *Wirley Birch* to quaſh an information *qui tam*, *&c.* againſt the defendant, (a clergyman) on the ſtatute of 21 *H.* 8. *c.* 13. for non-reſidence, becauſe it was found before juſtices of aſſiſe, who (as it was reſolved on the motion for the *certiorari* in this caſe) have no authority by that act.

On the other ſide it was argued by ſolicitor general *Strange*, that informations are not quaſhed by the courſe of the court; but this is merely a matter *ex gratia*: And the court never quaſhes any thing but where the cauſe is of ſmall moment, and the matter very plain. An indictment for a nuiſance is always refuſed to be quaſhed. And in *The* * P 175 *King* and *Sadler*, *Trin.* 9 *G.* 2. an indictment *for perſuading *A.* to marry *B.* in order to charge one pariſh and diſcharge another, was prayed to be quaſhed, but denied. And in *The King* and *Gibbs* (*a*) *eodem termino*, a motion was made to quaſh an indictment for ſelling by falſe meaſures, but it was refuſed. In the principal caſe the informer is intitled to part of the penalty, and therefore the quaſhing the information may deprive him of his property: For in this caſe he hath no remedy over; whereas if it be adjudged againſt the proſecutor upon a demurrer, he may bring a writ of error. And Mr. ſolicitor ſaid, he would not now enter into

V. Sayer 260. 4 Bur. 2106. Cald. 246.

(*a*) See 1 Stra. 497. 8 Mod. 58. 1 Seſs Ca. 263.

into the queſtion upon the merits, becauſe this was done upon the motion for the *certiorari*.

It was replied by Mr. *W. Birch*, that this is not a matter of great importance; and the crime here charged is alſo puniſhable by the ſpiritual law. But ſuppoſing the matter to be of ever ſo high a nature, the information ought to be quaſhed, as the judges of aſſiſe had no conuſance thereof. And he ſaid, that he moved laſt term to quaſh an information, becauſe it was filed by an improper officer; and it was quaſhed, becauſe the court could not hold plea thereof. It was alſo urged, that a writ of error lies as well where an information is quaſhed upon motion, as where a judgment is arreſted.

But the court was unanimouſly of opinion, that the information ought not to be quaſhed; and this on the authority of 1 *Sid.* 152. and *The Queen* and *Trotter*, (*b*) *Paſ.* 11 *Ann.* (which *Lee* C. J. now cited as in point.) In this laſt caſe it was moved by Mr. *Forteſcue* to quaſh an information for exerciſing the trade of a butcher, without having ſerved an apprenticeſhip therein; but the court denied it. And *Parker* C. J. there ſaid, that theſe informations are in the nature of civil actions, and the perſons proſecuting them have an intereſt in them,

(*b*) Poſt 217. called *Q.* v. *Potter.* S. P. poſt 216.

In the principal caſe the motion was therefore denied.

Poſt. 291.

Anderſon

Plea of bankruptcy of the plaintiff muſt conclude to the country.

ERROR of a judgment in an action of——— wherein the defendant below had pleaded, that the plaintiff became bankrupt, *&c.* and he concluded with a general averment. And it was now objected by Mr. *Bicknell* for the plaintiff in error, that this is wrong; for that the defendant ſhould have concluded to the country. And he cited *Lupton* and *Atkinſon*, *Hil.* 2 *G.* 1. in *C. B. Rot.* 1624. where this objection was held fatal.

And *Chapple* juſt. mentioned two other caſes, where the ſame point was determined accordingly.

And no counſel appearing on the other ſide, the judgment was reverſed. *

* S. P. *Miles* v. *Williams* 1 P. Wms. 249. 10 Mod. 160. 243. Gilb. Rep. B. R. 318. where bankruptcy of the defendant is pleaded. So *Gey* v. *Bayley*. *Fuller* v. *Byng*. Fort. 334. *Poole* v. *Broadfield*. Barnes. 330. *Quære*, the correctneſs of the report of the principal caſe, that the plea was of the plaintiff's bankruptcy.

The

The King againſt *the biſhop of Ely.*

IT was moved by ſerjeant *Eyre* in *Trinity* term, in the tenth year of the preſent King, that a *mandamus* might go to the biſhop of *Ely*, commanding him, as general viſitor of *Trinity* college in *Cambridge*, to compel Dr. *Walker*, the vice-maſter, to deprive Dr. *Bentley*, the maſter of the college: He having been convicted by the ſaid biſhop, as ſpecial viſitor, of dilapidation; and ſentenced thereupon to be deprived, according to the ſtatutes of the college. And this motion was founded on an affidavit, that Dr. *Walker*, the vice-maſter, in whom the power of executing ſuch ſentence is lodged by the ſtatutes, had refuſed to deprive Dr. *Bentley*; and alſo upon a petition by ſeveral of the fellows of the ſaid college to the biſhop of *E.* complaining of *Walker*'s refuſal, and praying the biſhop to compel him to execute the ſaid ſentence, according to his (the biſhop's) viſitatorial power: Which, it was alſo ſworn, the biſhop had refuſed.

Whether a *mandamus* lies to the biſhop of *Ely* as general viſitor of *T. College, Cambridge*, to compel the vice-maſter to deprive the maſter, who was convicted by the biſhop as ſpecial viſitor, and ſentenced to be deprived.

*But it was then ſaid by lord *Hardwicke*, (who was chief juſtice of this court when this matter was firſt ſtirred) that a *mandamus* cannot properly be granted to one man, to compel another to do an act; as it is here prayed. And ſuppoſing the biſhop of *Ely* to be general viſitor, he is to judge what is proper to be done; and therefore a *mandamus* does not lie, commanding him to do a particular act; but only, in

* P 177

in general, to viſit the college, or to put in execution the ſtatutes of the college upon this complaint.

A rule was therefore granted for the biſhop of *Ely*, and the maſters of the college, to ſhew cauſe, why a *mandamus* ſhould not go to the biſhop, commanding him to proceed upon the complaint contained in the affidavit.

And in *Hilary* term, 10 *G.* 2. it was argued by ſolicitor general *Strange* and others, in behalf of the college againſt the *Mandamus*; and by the ſerjeants *Eyre* and *Wynne* on the other ſide: But the argument was then ordered by the court to be confined to this queſtion only, whether a *Mandamus* was proper, ſuppoſing the biſhop of *Ely* to be general viſitor. For as to the point, whether he be ſo or not, the court ſaid, that the crown was principally concerned herein, as the college is of royal foundation; and therefore it is proper to hear counſel for the King upon this queſtion, it being very unreaſonable to grant the preſent *Mandamus*, upon hearing the matter litigated only between one party who admits the power, and the other who claims it, when it is dubious whether this laſt hath it or not. And it would be very odd, in caſe a *Mandamus* ſhould be granted without hearing the King's counſel, for the court afterwards to award a prohibition to its own rule.

2 Lord Raym. 1334. And lord chief juſtice *Hardwicke* ſaid, that when Dr. *Bentley* prayed to be reſtored to his degrees, the queſtion, whether the King hath the viſitatorial power, was likely to come up; and therefore counſel were heard for the King. It was therefore ordered

* P 178 to be added to the *rule, that his Majeſty's attorney general have notice of this motion.

And accordingly this term the caſe was argued at large by ſolicitor general *Strange* and Mr. *Greaves* for

for the college, and by ſerjeant *Wynne* and Mr. *Taylor* on the other ſide; Mr. attorney general *Ryder* being in court.

And it was argued againſt granting the *mandamus*, (1) That on the parties own ſhewing they are not intitled to it; for the ſentence appears to be given by the biſhop of *E.* as ſpecial viſitor; and in the complaint, to which the rule refers, it is prayed, that he compel Dr. *W.* &c. as general viſitor. Now if the biſhop be a ſpecial viſitor, which he ſeems to claim only, then all other powers not granted out of the crown ſtill remain therein, as the college is of royal foundation; and he hath no authority to do what it is now deſired he be compelled to. But if the foundation of this motion be true, *viz.* that he is general viſitor, then the ſentence is void, and ought not to be carried into execution, becauſe it is given by him as ſpecial viſitor. Beſides, if the biſhop is general viſitor, he doth not want the aſſiſtance of the vice-maſter. And therefore upon this ſentence and return, *quacunque via data*, the court is not warranted to grant a *mandamus*. The court has already granted a *mandamus* to Dr. *W.* the vice-maſter, to execute this ſentence; to which it was returned (in ſubſtance) that the King was general viſitor: But afterwards the writ was quaſhed, as *felo de ſe*, it being ſuggeſted thereby that the biſhop of *Ely* was general viſitor.* (2) It is not true, in fact, that the biſhop of *Ely* is general viſitor. And as to this, the

* *K.* and *Dr. Walker*, *Hil.* 9 *G.* 2. It was there alſo determined by the whole court, that the return was good, and that no peremptory *mandamus* ought to be granted, becauſe if the King be general viſitor, he may, and it is to be preſumed will, compel the vice-maſter to do juſtice; and therefore the party muſt firſt apply for a commiſſion of viſitation, and be denied, before he can have a *mandamus*. The reaſon is the ſame if the biſhop be general viſitor, as the writ ſuggeſts. *(A.)* S. C. Caſ. T. Hardw. 212. 3 Bac. ab. 520. 536. Bull. N. P. 199.

caſe

caſe (as verified by affidavit, and as it appears by the ſtatutes) ſtands thus: *Edw.* 6. gave a body of ſtatutes to the college, in which (*tit. de *viſitatore*) it is or-
* P 179 dained, "*quod epiſcopus Ellienſis viſitator ſit.*" Afterwards Q. *Elizabeth* gives them other ſtatutes; in the preamble of which notice is taken of the foundation of the college by *H.* 8. and that there had been ſome conſtitutions made for the government thereof, which were imperfect, and therefore ſhe had thought proper to give them new ſtatutes; "*& eas* "*univerſas leges in hunc libellum collect' perfectam mo-*" *rum & ſtudiorum regulam repreſentamus & commen-*" *damus, &c.*" And by theſe the biſhop of *Ely* is alſo made ſpecial viſitor. As to the ſtatutes of *E.* 6. it was ſworn by ſeveral of the ſenior fellows, that they were never kept in the archives of the college, but were in the hands of the biſhop of *Ely*, and were never ſeen by them till very lately; and that they were never read to or obſerved by them: And the ſeal was alſo torn off. On the contrary, the ſtatutes of Q. *Eliz.* are on record in the college, and always ſworn to be obſerved. All this (it was urged) amounts to ſtrong evidence, that the former ſtatutes were abrogated and cancelled; and the ſpecial viſitor, in whoſe cuſtody they now are, was probably the hand that originally received the ſurrender of them. There is alſo an inconſiſtency between theſe two ſets of ſtatutes almoſt in every inſtance: And if thoſe of *E.* 6. are ſtill in force, and the biſhop of *Ely* is thereby made general viſitor, it was perfectly idle to make him ſpecial viſitor by the laſt. Beſides, the ſentence here (as it is ſaid before) is given by him as ſpecial viſitor. And upon the *mandamus* to the vice-maſter it was returned, that the ſtatutes of *E.* 6. are cancelled, and that the King is general viſitor; and this has not yet been traverſed

or

or falſified. As the poſition therefore which is laid down in ſupport of the *mandamus* is not true, the preſent rule ought to be diſcharged; and for this reaſon *mandamus's* ſometimes have been ſuperſeded. *Salk.* 701. Sir *Joſhua Sharp* and *the mayor and aldermen of London, (a) Eaſt.* 13 *Ann.* A *mandamus* was granted to the aldermen of the city to admit a common council-man; and afterwards a *ſuperſedeas* was prayed to the writ, becauſe the right of admiſſion is only in the alderman of the particular ward for *which the party was choſen common council-man, and not in the body at large. And though it was objected to this, that the writ gives a juriſdiction to the perſons to whom it is directed, and is an evidence of their right, yet by lord chief juſtice *Parker* and juſt. *Eyre*, the writ ought to be ſuperſeded: But the other two judges were of opinion to the contrary, and that it was proper to wait for a return. It was however unanimouſly agreed, that if this matter had been ſhewn before the writ iſſued, they would not have granted it. *The King* and *the mayor, aldermen and common council-men of Norwich, (b) Trin.* 3 *G.* 1. Motion by Mr. *Page*, to ſuperſede a *mandamus* granted to the defendants for chuſing a town-clerk, upon ſhewing that the right of election was in the mayor and aldermen only: And the writ was accordingly ſuperſeded. (3) Suppoſing that the biſhop is general viſitor, yet a *mandamus* doth not lie to him as ſuch; and there is no precedent to be produced for this purpoſe. The reaſon is, that colleges are only private ſeminaries, & *forum domeſticum*, whereof the viſitor (who is always the founder, or his heirs, or a perſon appointed by him) is the ſole judge; whereas if a *mandamus* was grantable, this court would in effect be the viſitor. *Carth.* 92, 168. *Show.* 74. *Skin.* 454, 471. This court is indeed

(a) Gilb. Rep. B. R. 255.

* P 180

(b) Stra. 55

deed inveſted with a ſuperintendency over all inferior juriſdictions, and may either reſtrain them when they exceed their bounds, as by *quo warranto*, prohibition, &c. or elſe compel them, when they refuſe, to execute their power: But then in neither caſe it will interpoſe, if the publick be no ways concerned, which is the preſent caſe. Neither will this court interfere where a diſcretionary power is left in others to make a final determination. And therefore in *Gyles's* caſe, (c) *Mich.* 4 G. 2. a *mandamus* was refuſed to command ſome juſtices to licence a man to keep an alehouſe, becauſe the juſtices were judges of the matter by act of parliament; and *Salk.* 45. was cited to ſhew, that no appeal lay: And yet there the publick was concerned; and it was a caſe in which there was great hardſhip and oppreſſion on the ſide of the * juſtices. *Wilkins* and *Mitchell*, (d) *Trin.* 10 *W.* 3. Motion for a *mandamus* to a mayor, to grant execution of a judgment given in a borough-court; but it was refuſed, becauſe a writ of *de executione judicii* lay. And in *The King* and *the biſhop of Cheſter*, (e) (*Trin.* 1 G 2.) this court granted a *mandamus* to the biſhop of *Cheſter*, as warden of *Manchеſter* college, to admit a fellow; and the reaſon was, that his viſitatorial power was then ſuſpended: But the court ſaid, they would not have interpoſed if it had been exiſting. Beſides, it is beneath the dignity of this court to write to one perſon to compel another to do an act. And the granting this *mandamus* is in effect calling in aid of the biſhop of *Ely*, to do what this court refuſed to do, in a direct way, in the caſe before mentioned, of *The King* and *Walker*. It cannot reaſonably be objected, that the preſent queſtion is not proper to be determined on motion, for this is the only opportunity the college hath to oppoſe the *mandamus*. Indeed if the biſhop

(c) 2 Stra. 881.

* P 181

(d) 12 Mo. 196. 3 Salk. 229.

(e) 2 Stra. 797. 1 Barn. 52.

biſhop returns to the writ, that he is not general viſitor, a door will be opened to enter into for the litigation of this point. But if he falls in with the ſuggeſtion of the *mandamus*, and exerciſes this juriſdiction, as he moſt probably will, (all perſons being fond of power) the matter cannot be litigated; and his uſing of this authority will be a proof of his being intitled to it. This caſe is therefore ſimilar to that of Dr. *Willmot* and *King's college*. *(f)* There a complaint was made by Dr. *Willmot* to the biſhop of *Lincoln*, as viſitor of *King's college*; and upon hearing the caſe debated before the biſhop and commiſſaries, the complaint was diſmiſſed with coſts. Hereupon a prohibition was prayed by Dr. *W.* that coſts might not be levied upon him; and on that motion, the court allowed the commiſſaries to be heard by their counſel, becauſe theſe, who were concerned in the coſts, would have no other opportunity of being heard in the matter. And a rule being granted for a prohibition upon the judge only, it was afterwards ordered, that the college might be made parties, becauſe they could not otherwiſe be heard; and it would not be ſafe to truſt the judge only.

(f) 2 Barn. 173. 198. 340.

*On the other ſide it was argued, (1) That by the ſtatutes of Q. *Eliz.* a particular power is given to the biſhop of *Ely* in many inſtances, and particularly as to the amoving the vice-maſter; but yet, and conſiſtently herewith, he is the general viſitor, by the ſtatutes of *K. Ed.* 6. the words thereof being, "*quod viſitator epiſcopus Ellienſis ſit.*" And though in the ſentence he is recited to be ſpecial viſitor, yet as he refuſes to do juſtice, the party who now prays he may be compelled to do it, ſhall not be ſtopped by his own recital. (2) The ſtatutes of *Ed.* 6. by which the biſhop is made general viſitor, are ſigned with the hand-writing of that King. And though the

* P 182

the ſeal be torn off, which probably was done by ſequeſtrators in the time of the civil wars, it does not follow from thence that they are cancelled; which is a queſtion this court will not determine upon motion. As to the ſtatutes of Q. *Eliz.* there are no expreſs words of revocation therein; neither do they contain any thing inconſiſtent with the general viſitatorial power given by the other ſtatutes; but (on the contrary) the biſhop is mentioned in theſe as general viſitor: And the acceptance only of new ſtatutes doth not amount to a revocation of old ones, unleſs it be in inſtances where they are incompatible. Beſides the crown cannot take a ſurrender but by matter of record. Nor can a founder of a college repeal the power he has once given, without reſerving ſuch an authority. *Skin.* 513. The conſent of the biſhop, as well as of the college, is alſo neceſſary to conſtitute a good ſurrender of the old ſtatutes; and ſuppoſing that the college alone conſented, yet the biſhop is not bound by the ſurrender. Beſides, the acceptance of theſe new letters patent is no evidence of the biſhop's departing with his viſitatorial right; for this he may retain though he conſents to a new regulation of the college: All one as a rector continues ſuch, whilſt he keeps any part of the glebe, though he gives away the other part. It is alſo doubtful, whether a biſhop in this caſe could conſent to a ſurrender in prejudice to his
* P. 183 ſucceſſors. And as to the recital in the *ſentence of the biſhop's being ſpecial viſitor, this (as is before mentioned) ſhall not eſtop the preſent party. (3) Though the members of a college or hoſpital muſt apply themſelves to the general viſitor thereof in the firſt inſtance, becauſe it is a private eleemoſynary foundation; yet where a proper ſuit has been inſtituted before him, and he gives ſentence thereon,

this

this court, which hath a ſuperintendency over all inferior juriſdictions, will not permit him to ſtop ſhort, and not to execute it; as this would be a failure of juſtice. And ſuppoſing the biſhop of *Ely* to be general viſitor, if a *mandamus* does not lie to compel him to do his duty, the party is without remedy, as there can be no appeal from him: And it will be attended with great inconveniencies if viſitors may act in an arbitrary manner. In this caſe the publick is greatly concerned, as it relates to the adminiſtration of juſtice; and it is alſo of the greateſt moment to the community, that the governors of ſeminaries for learning ſhould be of a proper character; as ill examples are of very pernicious conſequence, eſpecially when placed before young perſons. That the legiſlature is of this opinion appears by its requiring the maſters of colleges to take the oaths of allegiance, leſt they ſhould ſow the ſeeds of diſloyalty in the minds of the perſons under their care. This caſe therefore is more ſtrong than many others: For a *mandamus* hath been often granted where the matter has been purely of a private nature; and alſo where there has been a diſcretionary power in the judge or party below, and where there was another remedy. Under this head were cited the following books and caſes. *F. N. B.* 153. The writ of *procedendo ad judicium.* *Palm.* 50. 1 *Vent.* 187. S. C. *Raym.* 214. S. C. 2 *Keb.* 871. *Comb.* 203. 5 *Mod.* 452.—*King* and *the maſters, fellows and ſcholars of Trinity college in Cambridge,* (g) *Trin.* 5 *W.* 3. A *mandamus* was granted to the defendants to deprive ſome fellows of the college for not taking the oaths.—*Hil.* 3 *G.* 1. A *mandamus* was granted to a quarter-ſeſſions to abate a nuiſance. (h)—*Micb.* 5 *G.* 1. *Mandamus* to an inferior court in *Sandwich* to give judgment in an action of aſſault and battery. (i)

(g) *Qu. St. Johns,* 4 Mod 233. Skin. 359. 368. 393. 546.-3 Bac. ab. 535.

(h) Cited Caſ. T. Hardw. 215. 3 Bac. ab. 535.

(i) Cited ibid. Stra. 113.

*P 184 *Bailey* *and *Burne*, (k) *Mich.* 7 *G.* 1. The queſtion there was, whether an inferior court can grant a new trial; and held that it could not, and therefore a peremptory *mandamus* for that purpoſe was refuſed: But it was admitted, that a *mandamus* lay to the ſheriffs of *London*, to give final judgment upon a writ of inquiry. *King* and *the bailiffs of Andover*, (l) *Trin.* 2 *G.* 2. A *mandamus* was prayed to the defendants to proceed to judgment, without an affidavit of their refuſal: But the court ſaid, they would preſume that all inferior judges would do right, unleſs the contrary be ſhewn. And afterwards, on an affidavit that they refuſed to give judgment, a *mandamus* was granted. *King* and *the mayor, &c. of Liverpoole*, (m) *Mich.* 2 *Geo.* 2. *Mandamus* was granted to the mayor of *L.* (which is a corporation by charter) to call a common council for the renewal of leaſes, and doing other buſineſs of the corporation. *King* and *the mayor, &c. of Glouceſter*, *Mich.* 1 *W. & M.* *Mandamus* to the defendants to reſtore one *Jordan*, as phyſician of *Bartholomew-hoſpital* in that city, notwithſtanding the right of viſitation was there veſted in the donor.—*Mich.* 5 *W.* 3. *Mandamus* to reſtore one *King* to the ſcholarſhip to *King's* (n) *college* in *Oxford*.—*Hil.* 6 *W.* 3. *Mandamus* to the rector, &c. of *Hamſworth* in *Yorkſhire*, to chuſe a maſter of an hoſpital there, founded by archbiſhop *Allgate*.—*Mich.* 29 *Car.* 2. the like writ.—*Mandamus* to *Clare-hall* to admit one *Jennings* to a fellowſhip.—*King* and *the biſhop of Cheſter*. (o) A *mandamus* was granted to the biſhop of *C.* as warden of *Mancheſter-college*, to admit a fellow; to which it was returned, that he (the biſhop) was viſitor: And it was held, that by being warden, his viſitatorial power was ſuſpended. This was the reaſon of the ſtatute of 2 *G.* 2. *c.* 29. which is only declaratory of the common law: And thereby it appears, that where

(k) Stra. 392 Fort. 198.

(l) 3 Bac. ab. 536.

(m) 1 Barn. B. R. 82.

(n) Qu. John's, 4 Mo. 260. 368.

(o) Ante 181.

where the King once departs with his viſitatorial power, he cannot reſume it. *King* and *the biſhop of Ely, (p)* 12 *Ann.* Upon the motion of Mr. *Page*, a rule was granted to ſhew cauſe, why a *mandamus* ſhould not go to Dr. *Moore*, biſhop of *Ely*, to examine certain articles then pending againſt Dr. *Bentley*. Nothing was afterwards done on this rule, the *biſhop reſolving to give ſentence; and one was actually drawn up: But he was prevented by death. A prohibition has alſo been granted in this very cauſe: And this court may enforce the viſitor to execute his juriſdiction by the ſame reaſon it has proceeded on in reſtraining him. There are alſo many caſes where a *mandamus* has gone to the ſpiritual judge, to grant adminiſtrations and probates of wills; which ſeem very applicable to the preſent caſe. But (it was ingenuouſly admitted) there is no inſtance to be found where a *mandamus* has been awarded to a viſitor. In 5 *Mod.* 453. there is a motion for that purpoſe, but nothing appears to be done thereupon. Laſtly, it was urged that the queſtion, whether the biſhop be general viſitor or not, is not proper to be determined on motion; but the court ought to wait for a return, that it may determine the matter judicially. And perhaps the biſhop may diſclaim the authority of general viſitor. 1 *Lev.* 23. 2 *Lev.* 14. 3 *Lev.* 309. and other caſes in thoſe *reports*. *King* and *the biſhop of Saliſbury, (q)* *Mich.* laſt. A *mandamus* was prayed to the biſhop, to grant inſtitution and induction to a prebendary. And upon an affidavit of Mr. *Clarke* only, who applied for the writ, that the archbiſhop of *Canterbury*, to whom the former prebendary had reſigned, was guardian of the ſpiritualities, though there were ſeveral affidavits to the contrary, the *mandamus* was granted;

(p) Poſt. 187.

* P 185

(q) Ante 20.

granted; and the court ſaid, they would have a return.

It was ſaid by the attorney general, that the only queſtion he was concerned in, on the ſide of the crown, is, whether the biſhop of *Ely* be general viſitor or not. Upon which head it is proper to conſider, whether the crown ever departed with its right of viſitation; and if ſo, whether that right be not reſtored by the acceptance of ſubſequent letters patent. And he deſired time to ſpeak to this point, if the court has any difficulty about it; and if they are of opinion that a *mandamus* is proper, ſuppoſing the biſhop to be a general viſitor.

* P 186 *And on the behalf of the biſhop of *Ely* it was ſaid by Mr. *Charles Clarke*, that his lordſhip did not think it proper for him to proceed in executing a general viſitatorial power, as now prayed, without having the opinion of the court thereon, to whoſe directions he ſubmits. But the court (which argued *ſeriatim*) were clearly of opinion, that the *mandamus* prayed ought not to be granted, becauſe it is at preſent very doubtful, whether the biſhop of *E.* is general viſitor: And the conſtant diſuſe of the ſtatutes of *E.* 6. and obſervance of thoſe of Q. *Eliz.* together with the oath and other circumſtances, amount to a ſtrong evidence, either that the former were never accepted, or elſe have been regularly ſurrendered. However, this point (at beſt) being doubtful, it ought to be ſettled, not on motion, but in a more ſolemn manner before a *mandamus* is granted. For it would be abſurd and unjuſt to compel a perſon to execute a power, which perhaps he is not intitled to. If the writ ſhould go, it is not to be preſumed the biſhop will make a return, deveſting himſelf of the viſitatioral power: And if he executes it, the perſons now oppoſing it will be utterly precluded thereby.

But

But by *Lee* C. J. if the biſhop had clearly appeared to be general viſitor, this court has a power to compel him to execute his authority. But he ſaid, it ſeems now to be ſettled, that a *mandamus* will not lie to a viſitor to admit fellows.

And by *Probyn* juſt. it is abſurd to command the biſhop, as general viſitor, to execute a ſentence given by him as ſpecial viſitor, theſe being inconſiſtent juriſdictions: And conſequently if he be general viſitor the ſentence is wrong; neither can the vice-maſter execute it, he having no power but in thoſe inſtances where the biſhop acts as ſpecial viſitor.

The rule to ſhew cauſe, *&c.* was therefore diſcharged.

**Note*; Whilſt this matter was pending, a ſearch was directed to be made for precedents. And afterwards the court ſaid, there was not one to be found of a *mandamus* to a viſitor: That in biſhop *Moore*'s time there was a rule to ſhew cauſe, but nothing afterwards was done: *(r)* And that in *Uſher*'s caſe, *(ſ)* as appears by the notes of one of the judges, the court would not determine this queſtion, *propter difficultatem*; but they thought it proper in the firſt place to be ſatisfied, whether there was any viſitor, and who: But nothing was done.* * P 187

(r) Ante 184. *(ſ)* 5 Mod. 453.

* In *Rex* v. *Biſhop of Bly.* 1 Wilſ. 266. 1 Blackſt. 52, a *mandamus* to hear an appeal as viſitor of T. college was refuſed; it being doubtful whether he was viſitor. The point whether a *mandamus* lay to a viſitor the court left, as they found it, undecided.—Vide *Rex* v. *Biſhop of Lincoln* 2 Term. Rep. B. R. 338 n.

Smith

Smith against *Wilson*.

Where a note is taken for a precedent debt, it must be intended to be taken as payment upon condition that it is paid in a reasonable time; but if the perſon taking it, doth not endeavour to procure ſuch payment, and the money is loſt by his default, he muſt bear the loſs. 3. *G.* 2. *c.* 26. extends only to contracts for coals and to caſes between indorſer and indorſee.

AN action was brought for goods ſold and delivered, and for money laid out by the plaintiff for the defendant's uſe. And upon the trial of the cauſe, at the aſſiſes held at *Newcaſtle* upon *Tyne*, a verdict was given for the plaintiff, ſubject to the opinion of the court, upon the following caſe, which was ſettled by the conſent of both parties.

The plaintiff, 26 *February* 1734. ſold coals to the defendant to the value of 96*l.* and had alſo paid ſeveral ſums for him to the amount of ———: And towards payment thereof, the defendant afterwards, on the ſame day, delivered to the plaintiff a promiſſory note drawn by one *Jones*, dated, 13 *February* 1734. whereby the ſaid *Jones* promiſes to pay to the defendant or order 100*l.* for coals delivered to his father and himſelf; and the defendant indorſes over the note to the plaintiff. An account was afterwards ſtated between the parties, in which the note was included; and a receipt was ſigned at the foot of it, by the plaintiff in theſe words; "Received "the contents when the above mentioned bill is "paid." The plaintiff indorſed over the ſaid note to another perſon, and there were afterwards ſeveral other indorſements thereof: And *28 *March* 1735. it became due; and from that time, until 13 *May* following, the *Jones's* carried on their buſineſs, and paid many greater ſums than that mentioned in the note;

*P 188

note; and then they became bankrupts, the ſaid note remaining unpaid. The defendant was maſter of a ſhip employed in carrying coals from *Newcaſtle* to *London*; and the *Jones's*, father and ſon, were lightermen and copartners.

On the part of the plaintiff it was argued by Mr. *Deniſon*, that two queſtions are here proper to be conſidered; (1) Whether the plaintiff by receiving this note, and not applying for the money due thereon, hath loſt his original debt. (2) Whether the ſtatute of 3 *G.* 2. *c.* 26. makes any difference in or affects the preſent caſe. As to the firſt point, it muſt be admitted, that in an action brought on a note by an indorſee againſt an indorſor, it is a ſufficient diſcharge of the indorſor, if it be proved that no application was made to the drawer within a reaſonable time after the note became due, the indorſor being only a warrantor of the drawer; and ſo it was held lately in the caſe of *Goodman* and *Shipway*‡: But this is not material in the preſent caſe, this being not an action on the note, but for the original debt, which is not extinguiſhed by the acceptance of the note. Indeed, where a bill is taken as caſh by a creditor, it is at his peril; but where it is accepted conditionally, if the money is paid, (which was here done, as appears by the receipt) the creditor only loſes his ſecurity, on non-payment of the bill. 1 *Salk.* 124. S. C. 12. *Mod.* 203. *Same book* 408. The diſtinction there ſettled is a very reaſonable one, becauſe an original debt is not taken away or extinguiſhed by a note given or indorſed over by the debtor, this being only a choſe in action; and it is taken in caſe of the debtor, and for the creditor's farther ſecurity; For a debt due on ſimple contract can only be determined or extinguiſhed by payment,

‡ Cited 1. Eſpinaſſe N. P. 56. Theory of Evid. 86.

S.C. 3 Salk. 68; Holt. 114.

or

or accord with ſatisfaction, or acceptance of a ſecurity of a ſuperior nature. (2) As to the act of G. 2. this extends only to ſuch indorſors as are coal-ſellers, and that too in the port of *London*; whereas
* P 189 *the preſent defendant is a buyer of coals at *Newcaſtle*: And he is ſued not upon the note, but for the original debt.

It was argued on the other ſide by ſerjeant *Bootle*, (1) That this note was not given in ſatisfaction of a precedent debt; it being ſtated in the caſe, that the coals were bought, and the note delivered on the ſame day; ſo that the whole is to be regarded as one intire tranſaction. This caſe therefore differs from that in *Salk.* 124. the note being there given for a precedent debt. And here, the keeping the note ſo long, and the indorſing it over by the plaintiff, is ſufficient evidence that it was accepted as a ſatisfaction. To this point the ſerjeant cited 6 *Mod.* 147. and *Griffith* and *Pope*, (*a*) 10 *W.* 3. in *C. B.* at *Guildhall*, before *Treby* C. J. (Which caſe, he ſaid, he took out of the MS. notes of ſerjeant *Salkeld*). That was an action upon an *indebitatus aſſumpſit* for goods ſold and delivered: And it was proved at the trial, that the plaintiff had ſold glaſſes to the defendant, who gave him a bill for the money drawn on one *L.* whereupon the plaintiff gave to the defendant a receipt for the bill generally. *L.* accepted the bill, but afterwards proved inſolvent, the bill being unpaid: And three years after the bill was drawn, notice was given to the drawer. And the C. J. directed the jury, that the plaintiff's keeping the bill for ſo long a time, was ſufficient evidence that he accepted it as payment. As to the ſecond point, it was urged, that this note being given for coals, and by perſons who were lightermen and buyers of coals in *London*, it is in every circumſtance within the act: And

(*a*) Bull. N. P. 153.

And it makes no difference that the note was indorſed over, the ſtatute being general, and the words are, "any law, cuſtom or uſage to the contrary "thereof notwithſtanding." It was alſo obſerved, that a mutual advantage is given thereby to the indorſor and indorſee: To the laſt, by giving him twenty days to proteſt; whereas he had but three days before: And to the other, by diſcharging him, if there be no proteſt within that time.

*But the whole court were clearly of opinion, (1) That the ſtatute of *G.* 2. doth not affect this caſe, that act extending only to contractors for coals, and to caſes between an indorſor and indorſee; whereas this action is not brought upon a note. (2) It was held (by *Lee* C. J. and *Page* and *Probyn* juſt.) that where a note is taken for a precedent debt, which is the preſent caſe, it muſt be intended to be taken by way of payment, upon this condition, that the note is paid in a reaſonable time: But if the perſon accepting it doth not endeavour to procure ſuch payment, and the money is loſt by his default, he muſt, and it is reaſonable that he ſhould, bear the loſs. And *Lee* C. J. cited *Ward* and *Evans* (*a*); and *Griffith* and *Pope*, (which he ſtated in the ſame manner as at the bar) as caſes in point. And *Probyn* juſt. ſaid, that as here the note was indorſed over by the plaintiff, it is to be intended that thereupon he received the money; ſo that as to him the agreement is performed. But *Chapple* juſt. doubted as to this point, becauſe the receipt ſeems to be a full agreement, that the note ſhall not be a diſcharge of the debt, unleſs it be actually paid. To which the reſt of the court anſwered, that the receipt is indeed a plain proof that the note was not accepted as money; but it would be very hard to conſtrue it in ſo ſtrict a manner as to make

* P 190

(*a*) 2 Lord Raym. 928. 2 Salk. 442. Comyns. Rep. 138. 6 Mod. 36. 3 Salk. 118. 12 Mod. 521. Holt, 120.

make the acceptance of the note quite insignificant, where the party keeps it for a long time, and the money due thereon is lost through his own laches: For according to this he may keep the note for twenty or thirty years, and then come and charge the other party with the original debt.

But *Chapple* just. still hesitating, the case was adjourned.

See post. 228. Judgment for the defendant.

* P 191

**Moore* against *Wicker*.

Ante 47.

THIS case was now stirred up again by Mr. *Filmer* for the plaintiff in error; and no one appearing on the other side, the judgment was reversed: And the court said, there was a very strong objection in the case, but they did not intimate what was the objection.

S.C. 2 Sua. 1089.

Chapman against *Mattison*.

The curstor of the Chancery of *Durham* is bound to make out a mandate upon a *Latitat* directed to the Bishop of *Durham*.

AN attachment was prayed last *Hilary* term by Mr. *Denison* against Mr. *Hilton*, the cursitor of the Chancery-court of the county-palatine of *Durham*, for refusing to make out a mandate, upon an *alias latitat*, which issued out of this court to the bishop of *Durham*. And it was said, that the action was *indebitatus assumpsit* for 70*l*.

Against

Againſt this motion it was now argued by Mr. *Bootle*, and the attorney general of the county-palatine of *D.* (1) That this *latitat* commands the biſhop of *D.* to do what by act of parliament he is prohibited: For it directs the biſhop "by your writ" to command the ſheriff, *&c.* whereas it ſhould have been ſaid [our writ] in the name of the King; according to the ſtatute of 27 *H.* 8. *c.* 24. (*ſect.* 3.) which requires all writs in counties-palatine to be in the King's name. And though this writ is mandatory, yet it implies a negative, that the proceſs to be iſſued by the biſhop ſhall not be in the King's name: And in the ſame manner the ſtatute of 23 *H.* 6. *c.* 10. which is in the affirmative, implies a negative, that ſheriffs ſhall not take more fees than are there preſcribed. (2) The ſtatute of 2 *G.* 2. *c.* 23. *ſ.* 22. is not here complied with, this *latitat* being not ſubſcribed by any attorney of the county-palatine, whoſe name might be put to the mandate, but by an attorney of this court only; which is contrary to the conſtant practice. But ſuppoſing that *neither of theſe * P 192
objections will prevail, the queſtion will then be, whether a *latitat* runs out of this court into the county-palatine of *Durham*: And this may be now very properly determined, eſpecially as a motion has been already made, on the inſtance of the biſhop, for ſuperſeding the *latitat.* 2 *Saund.* 193. Now as to this point, which is of great conſequence to counties-palatine, (for if theſe writs run there, they will have but little juriſdiction left) it is to be obſerved, that this county is a county-palatine by preſcription, and of great antiquity. *Selden's titles of honour, part* 2. *c.* 5. 531. *Cambden's Britan. p.* ——— 5 *E.* 3. 58. *a.* 17 *E.* 3. 56. *a.* And formerly the owners of counties-palatine had *jura regalia.* They might pardon

don treaſons, and all felonies whatſoever; and had the power of appointing juſtices in *eyre*, of gaol-delivery, and of the peace; and alſo of iſſuing all kinds of writs, both original and judicial, in their own names. The juriſdiction of counties-palatine is conſidered as an original juriſdiction; and is ſuperior to, and more abſolute than, that of any other franchiſed or exempt courts; as thoſe of the cinque-ports, or of ancient demeſne: For of theſe the juriſdiction muſt be pleaded; whereas of the other, this court will take judicial notice. 9 *H.* 7. 12. *Bro. judgment* 76. 2 *Inſt.* 557. 4 *Inſt.* 212. 1 *Saund.* 74. S. C. 1 *Sid.* 330. This ſhews, that there is no ſuſpicion that there is any failure of juſtice within the juriſdiction of counties-palatine. Indeed in caſes of treaſon and attachment, proceſs out of other courts will run in counties-palatine; the reaſon whereof is, that theſe touch the prerogative royal, and imply a *non omittas*: And ſo it is in the caſe of the King's debtor, as in a *quo minus*; this being in aid of the crown. And a writ of error may be brought on a judgment given in a county-palatine, this writ being only in nature of a commiſſion for correcting the errors of the judgment; and without it there would be a failure of juſtice, as there is no other way for rectifying the judgment. But none of theſe reaſons extend to the preſent caſe, which is that of the King's ordinary writ. And that the juriſdiction of this
* P 193 county-palatine is an *exempt juriſdiction, within which the King's writs do not ordinarily run, appears by the following authorities. *Stat. de prærog. Regis*, 17 *E.* 2. *c.* 1. *Stat.* 9 *E.* 3. *c.* 4. *Stat.* 8 *E.* 4. *c.* 2. *Stat.* 1 *E.* 6. *c.* 10. *Stat.* 5, 6 *E.* 6. *c.* 26. *Stat.* 5 *Eliz. c.* 23. *ſ.* 11. *Stat.* 31 *Eliz. c.* 9. *Maynard's Edw.* 2. 424, 613. 45 *E.* 3. 17. (cited 4 *Inſt.*

Inſt. 219.) 49 *E.* 3. 24. 50 *E.* 3. 5. 30 *H.* 6. 6. 32 *H.* 6. 25. *b.* 39 *H.* 6. 21. 9 *H.* 7. 11. *b.* *Sav.* 35. 2 *Roll. Rep.* 53. 1 *Bulſt.* 160. 3 *Bulſt.* 158. 1 *Vent.* 155. S. C. 2 *Lev.* 24. 1 *Salk.* 354. *Prince* and *Moulton*, (*a*) *Hil.* 7 *W.* 3. Action on the caſe in this court for exalting a mill-bank, whereby ſome meadows in *Cheſter* were overflowed; and the cauſe was ſent down by *mittimus* to be tried there: And afterwards the judgment was arreſted here for a fault in the declaration. A writ of error was brought hereupon in the Exchequer, 26 *May* 1699. and it was held, that the action ought not to have been brought in this court: And the judgment was reverſed. *Dodd* and *Fletcher*, (*b*) *Trin.* 8, 9 *W.* 3. *Roll.* 340. Debt on bond in the King's Bench, and the cauſe was tried at *Cheſter*, and the plaintiff obtained judgment; whereupon a writ of error was brought in the Exchequer-chamber; and *Trin.* 11 *W.* 3. the judgment was reverſed. *Done* and *Richardſon*, (*c*) *Trin.* 6 *Ann. Roll.* 89. Action on the caſe in ——— for obſtructing a way in the county-palatine of ——— and the plaintiff obtained judgment, upon which a writ of error was brought; but the defendant in error did not think proper to compel the plaintiff to proceed. *Leach* and *Page*, (*d*) *Mich.* 11. *Ann.* Motion to ſuperſede an *habeas corpus* which had iſſued to the county-palatine of *Cheſter*, becauſe the cauſe would be thereby taken out of a rightful juriſdiction: And after great debate it was agreed, that where it appeared the defendant reſided in the county-palatine, it could not be removed by *habeas corpus*; and the writ was ſuperſeded. As to the caſe of *Acton* and *Somner*, (*e*) *Hil.* 5 *G.* 1. in *C. B.* that was a local action, and conſequently there might be a failure of juſtice, if it was not maintainable; Whereas this is a tranſitory action, and may be

(*a*) Carth. 386. 2 Salk. 663. Ld. Ray. 248. Comb. 442. 12 Mod. 131. Holt. 192. poſt. 197.

(*b*) Poſt. 195. 197.

(*c*) Poſt. 197.

(*d*) Fort. 270.

(*e*) Lill. Ent. 217. poſt. 198.

be brought in any county. It was further urged, that
* P 194 it would be of great * inconvenience to the inhabitants of counties-palatine to ſubject them to the writs of this court; and a great infringement of the privileges of the attornies of thoſe counties: And it will alſo leſſen the revenue of the biſhop of *D.* who is intitled to a fine where the cauſe of action is above 40*l.* Beſides, the writs of this court were never obeyed in the county-palatine of *Durham*; [whereof affidavits were produced, ſworn by ſeveral antient attornies there.] And if there are any precedents of ſuch writs iſſuing to other counties-palatine, it doth not affect the right of this county: And precedents of proceſs, without any judicial determination, are of ſmall weight. *Vaugh.* 419.

On the ſide of the motion it was argued by ſolicitor general *Strange* and Mr. *Deniſon*, (1) That the ſtatute of 27 *H.* 8. does not extend to a mandate on a *latitat*, this being not an original or judicial writ, but only by way of bill. Beſides, this *latitat* is to be underſtood according to common parlance, and means ſuch a writ as by law the biſhop may iſſue; and it is called [your writ], becauſe it is teſted in his name. (2) The name of an attorney is ſet to the *latitat*, and this is ſufficient: But to mandates in counties-palatine it is never ſet; nor is it to be ſuppoſed that the attornies of theſe places would apply for or ſign ſuch mandates. Beſides, the proceſs hath not yet iſſued, and after this the name muſt be ſet. As to the main point, the juriſdiction of counties-palatine was formerly *vexata queſtio*; but of late years it has been fully ſettled, particularly in *Action* and *Somner*. *(f)* That indeed was a local action, but this makes no difference: For as in ſuch caſe if the cauſe of action ariſes within the juriſdiction of the county-

(f) Ante 193. Poſt. 198.

county-palatine, yet to prevent a failure of juſtice, (*i. e.* if the defendant does not live there, or has nothing ameſnable to ſatisfaction) this court hath a juriſdiction; ſo in tranſitory actions, which this does not appear to be, where the cauſe doth not ariſe within the county-palatine, it will be a manifeſt failure of juſtice if the defendant cannot be arreſted in the county-palatine. That the writs of this court run there, ſeems plain by the ſtatute of 11, 12 *W.* 3. *c.* 9. and by the rule made *Trin.* 12 *C.* 1. that * P 195 the ſheriff of *Cheſter* (which is a county ſuperior to *Durham*, 4 *Inſt.* 211.) do return all writs from this court, under the penalty of 50*l.* And to intitle the county-palatine, it muſt be ſhewn, that the cauſe of action ariſes within its juriſdiction; for if it ariſes elſewhere, the plaintiff cannot recover in the county-palatine. The preſent queſtion is certainly of great conſequence; and therefore it is very improper to determine it on motion; but it ought to be put in ſuch a way as that it may receive the determination of the dernier reſort; and therefore a plea to the juriſdiction is the only way in which the defendant can take advantage of this matter. *Fitz. juriſdiction* 29, 57. confirmed in *Comb.* 115. *Sav.* 35. 4 *Inſt.* 213. 12 *Co.* 114. *Hardr.* 509. *Carth.* 354. *Lee* and *Ranſome*, (*g*) *Hil.* 9 *G.* 2. A *latitat* iſſued to (*g*) Poſt. 199. the county-palatine of *Lancaſter*, to which it was returned, that the cauſe of action aroſe within the juriſdiction of the county-palatine, and that ſuch writs did not run there: but the court quaſhed the return; for that it does not lie in the officer's mouth to return this matter. And (it was now ſaid, that) all other counties-palatine ſubmit to proceſs iſſued out of this court; which is a ſtrong proof of its legality. In the caſe of *Prince* and *Moulton*, cited *contra*, the only matter the court went upon was the fault in the declaration.

declaration. And in *Done* and *Richardſon* no judgment was given. And though in *Dodd* and *Fletcher* the judgment was reverſed, it was to the diſſatisfaction of C. J. *Holt*, and other judges; as was mentioned in *Acton* and *Somner*; and that caſe was not there adhered to. As to ſuperſeding the writ, that cannot be done now, becauſe it is returnable; in which caſe it is never done: And Mr. ſolicitor ſaid, he believed there was a caſe where the court refuſed to ſuperſede an *excommunicato capiendo* after it was returned. To this point the court now agreed: And *Lee* C. J. ſaid, it had been ſo determined in the caſe of a *mandamus*.

But as to the principal point the court took time to adviſe: And afterwards in this term *Lee* C. J. delivered the reſolution thereof as follows:

* P 196 *There is no ground for the conceit, that the late act for regulation of attornies is in this caſe broken; inaſmuch as the *latitat* iſſued out of this court, and was ſigned by an attorney hereof. Upon the laſt argument the court ſaid, that this ſtatute does not extend to mandates. And ſuppoſing the practice of the county-palatine to be to the contrary, as has been mentioned, this is no excuſe to the officer, becauſe if this court can ſend a writ to the county-palatine, it ought certainly to be obeyed. In this point the preſent caſe is ſimilar to that of Mr. *Yeates*, the deputy of the *cuſtos brevium* in the Common Pleas, which was *Mich.* 4 *G.* 1. A *certiorari* was there awarded out of this court, for removing an original from the Common Pleas; and for not doing this, an attachment was prayed againſt the officer, upon an affidavit, that the ſaid original was amongſt a bundle of papers in the office. And although it was ſworn on the other ſide by *Yeates*, that a *ne recipiatur* was entred againſt the original, and that this could not be

be filed before the *ne recipiatur* be taken off, which cannot be done by the practice of the Common Pleas, without leave of that court; this was held to be no ſufficient excuſe for *Yeates*, becauſe as this court had a power to ſend a *certiorari*, they may lawfully uſe all means that are proper for attaining the end of ſending it; And he was committed. And *Eyre* juſt. ſaid, that the power of this court would be very precarious if ſuch excuſes were to be ſuffered. The other exception to the form of the writ is not material: For by the words [by your writ] the biſhop is commanded, in effect and according to the meaning thereof, by his writ under the ſeal of the county-palatine, *&c.* and to compel the ſheriff as by law he ought.

Under the principal queſtion much hath been ſaid of the dignity of counties-palatine, and of the ſuperiority of the juriſdiction thereof to other inferior courts: And particularly it has been ſaid, that judgments given in the courts of *Weſtminſter-hall*, in all caſes where the *counties-palatine have a juriſdiction, P * 197
are abſolutely void; whereas they are voidable only where any other inferior court has juriſdiction. This point I ſhall not controvert; but it doth not affect the preſent queſtion, which is, whether the King in this court can ſend a writ to command the deputy-officer of the court of this county-palatine to iſſue his mandate. It is urged that he cannot, becauſe *brevia* v. Hargrave's Tracts 417. 418. &c.
domini regis non currunt into counties-palatine; and the ſtatutes of 17 *E.* 2. *c.* 1. 1 *E.* 6. *c.* 10. 5 *El.* *c.* 23. *ſ.* 11. 31 *El. c.* 9. and others have been cited to this point. However it has been agreed at the bar, that this rule is to be underſtood under ſome reſtrictions. In 4 *Inſt.* 212. there are three exceptions made to it: And beſides theſe, it appears that

other writs, and in other inſtances, have gone to counties-palatine; as in 1 *Sid.* 92. 1 *Salk.* 146. As to the expreſſion in the acts, that the King's writs do not run into counties-palatine, the meaning is, that they do not run to the ſheriffs of thoſe counties; which they do not, becauſe theſe are not the King's officers: And that this is the proper conſtruction of that expreſſion, appears partly by the preamble of the ſtatute of 1 *E.* 6. *c.* 10. On this ſide of the queſtion was cited *Dodd* and *Fletcher*, where the judgment of this court was reverſed in the Exchequer-chamber, it appearing that the cauſe of action aroſe in a county-palatine. But this (as I was informed by Sir *Clement Wearg*, who told me, he received his report from the deputy of the Exchequer) was done at the inſtance of the defendant in error, for the ſake of expedition, the judges in the Exchequer being divided in opinion. *Done* and *Richardſon* was alſo cited, but no judgment was there given. And in *Prince* and *Moulton*, the judgment was reverſed on a different point, and no opinion was given upon that of juriſdiction. It hath on the other ſide been often determined, that if a perſonal action is brought in this court, where the cauſe of action aroſe in a county-palatine, and the defendant doth not plead to the juriſdiction, he can take no advantage thereof. In the caſe of *Rigden* and *Sir Charles Hedges*, (*b*) *Paſ.* 12 *W.* 3. (which I have from a MS. report) ſerjeant *Carthew* *reflected on *latitats* being ſent into counties-palatine: At which *Holt* C. J. was greatly offended; and he ſaid, that if a man is arreſted in a county-palatine, and he doth not plead to the juriſdiction, this court ſhall hold plea thereof: And ſo (he ſaid) it is not only in a perſonal action, where the cauſe thereof aroſe in a county-palatine, but

Ante 104.

(*b*) *Rigden v. Hedges*, 12 Mod. 246. Ld. Ray. 446.

* P 198

but alſo in a local one, if there be no plea to the juriſdiction: And he cited 12 *Co.* 114. *Fitz. juriſ.* 29, 57. Agreeable herewith are the caſes cited in *Carth.* 11, 354. and of *Sonmer* and *Aſton*, *Paſ.* 5 *G.* 1. in *C. B.* There the plaintiff declared againſt the defendants *in cuſtod' mar'*, for taking a gelding. As to the force, they plead Not guilty; and as to the reſidue, that two of the defendants were overſeers of a vill in *Cheſter*, and the third, a conſtable thereof; and ſo they juſtify by way of diſtreſs, under the ſtatute of 43 *Eliz.* To which the plaintiff replied *abſque injuria ſua propria*: And judgment was thereupon given for the plaintiff. A writ of error was brought of this judgment; and after two arguments, the one by Mr. *Bootle* for the plaintiff in error, (in which he argued much to the ſame effect as he has done in this caſe) and by Mr. *Fazakerly* on the other ſide; and the other by ſerjeant *Cheſhire* and Mr. *Reeve*, the judgment was affirmed in this court. From theſe caſes it appears, that in all perſonal actions, whether local or tranſitory, if there be no plea to the juriſdiction, the courts of *Weſtminſter-hall* may hold plea thereof. If indeed the title of lands in a county-palatine comes in queſtion in a real action, that can be brought only in ſuch county; the true reaſon whereof is, and ſo it was mentioned by lord chief juſtice *Holt*, in the caſe of *Rigden* and *Sir Charles Hedges*, that in ſuch caſe the ſummons muſt be on the land, and no judgment can be given until after appearance. But in ejectments it hath been thought proper to plead to the juriſdiction: And in lady *Falconbridge's* caſe, (*i*) *Trin.* 3. *G.* 2. in this court, it was moved by Mr. *Reeve*, for leave to plead to the juriſdiction; and he told me, the defendant pleaded accordingly. Where it is ſaid therefore in

(*i*) Barnard B. R. 60. 68. S. C. not. S. P. Vide Harg. Tracts. 420. 421.

the books, that where a county-palatine has a juriſdiction, an action brought in another court is void; this * muſt be underſtood of real actions, and of ſuch perſonal actions in which there is a plea to the juriſdiction. 1 *Mod.* 81. The preſent action may (for ought appears) be a tranſitory one; and the defendant may be fled from the juſtice of this court; and therefore it is within the reaſon of the above caſes, and like that of *Lee* and *Ranſome* in this court, *Mich.* 9 *G.* 2. A *latitat* was there directed to the duke of *Rutland*, chancellor of the county-palatine of *Lancaſter*; to which there was a return, that the county of *Lancaſter* is a county-palatine, where the King's writs do not run, and that all pleas are pleadable in the courts of the ſaid county-palatine, except, &c. and that no inhabitant of the ſaid county-palatine ought to be compelled to anſwer out of the ſame; and further, that the defendant is an inhabitant of the ſaid county palatine, &c. In this caſe no ſolemn opinion was given, but the court declared, that the return was frivolous; and therefore it was quaſhed: But no attachment was granted, becauſe the parties came to an agreement.

* P 199

(*l*) 2 Barnard, B. R. 318, 327, 337, 398.

In *Griffith* and *Alcock*, (*k*) *Hil.* 7 *G.* 2. in this court, the queſtion was, whether the ſervice of a copy of a *latitat*, the debt being under 10*l.* was ſufficient in a county-palatine without a mandate; and it was held to be a good ſervice on the words of the act; and it was there agreed, that there was a right of executing the *latitat* in the ſaid county. And (in *Trin.* 8 *G.* 2.) the court of Common Pleas came into the ſame opinion. The ſtatute of 11 *W.* 3. *c.* 9. *ſ.* 2. ſeems to allow of writs iſſuing out of *Weſtminſter-hall* to counties-palatine, the words thereof being, "any of his Majeſty's courts of record at *Weſtminſter*," without

Qu. Byers v. Whitaker Barnes. 406.

without confining it to the court of Exchequer. Upon the whole therefore, if the defendant would take advantage of the want of juriſdiction, he muſt plead it.

And the rule for an attachment was made abſolute.

A writ of *Latitat* runs into *Wales*.—Vide *Perry* v. *Jones*. Doug. 202. *Lloyd* v. *Jones*, Doug. 203. n.—*Lampley* v. *Thomas*. 1 Will. 193. cont.—Vide Hargrave's Tracts. 379.

The

*P 200 *The King against Bell.

Motion for an attachment cannot be grounded on a *Quaker's* affirmation, unleſs by conſent.

AN action on a by-law having been brought by the bailiffs of *Scarborough* and others againſt *Redhead* and others, in which the plaintiffs were nonſuited, an attachment was granted againſt the plaintiffs (one of whom was *Bell*) for payment of the coſts: Whereupon one *Stephenſon*, on the part of the plaintiffs, tendered the coſts to *Minſhull*, one of the defendants, who accepted the ſame accordingly. And an attachment was now prayed againſt him, for abuſing the proceſs of the court, by taking an unreaſonable ſum for coſts: And an affirmation of *Stephenſon*, a quaker, was now offered in ſupport of the motion. But ſolicitor general *Strange* objected hereto, that this is a criminal caſe, eſpecially as the cauſe, in which this motion is made, is intitled *The King* and *Bell*, and not the bailiffs of S. and *Redhead* and others: And conſequently this affirmation is no evidence, by the ſtatute of 7, 8 *W.* 3. *c.* 34. (*ſ.* 6.)

On the other ſide it was argued by Sir *Thomas Abney* and ſerjeant *Agar*, that the affirmation ought to be received, becauſe the original ſuit is a civil one; and conſequently the preſent caſe is not to be conſidered as of a criminal nature. And they cited *Powell* and *Ward*, *Eaſt.* 5 *G.* 2. Where an attachment was prayed againſt one for non-performance of an

an award; and the affirmation of a quaker in ſupport of the motion was allowed: And the court there ſaid, that until an attachment is granted, there is no criminal ſuit in court; but that on a motion for an information, an affirmation is never allowed. And in that caſe *The King* and *Wych (a)* was cited; which (as *Abney* ſaid, who was counſel therein) was an information againſt an attorney for male-practice, and an affirmation on the ſide of the proſecutor was refuſed. The late caſes of *The* **King* and *Shacklington*, * and of *Jones* and *Hudſon*, † were alſo mentioned; where this point came in queſtion, but was not determined, the matter being compromiſed in both thoſe caſes.

(a) 2 Stra. 872.

* P 201

In the principal caſe the court ſaid, that it made no difference, whether the original ſuit be a civil or a criminal one; but it muſt be conſidered as it

* *King* and *Shacklington*, *Hil.* 8 *G.* 2. Motion for an information againſt defendant, a quaker, for refuſing to act as ſheriff of *York*, he having been elected into that office; againſt which his own affirmation was offered to be read, but oppoſed: And on this ſide was cited (beſides *The King* and *Wych*) ——and *Lawrence*, *Hil.* 6 *G.* 2. where an affirmation of a quaker, in ſupport of a motion for anſwering the matters of an affidavit was refuſed. But in the principal caſe lord *Hardwicke* inclined to think, that the affirmation might be read, this being only to induce the diſcretion of the court, and therefore is not ſtrictly giving evidence; nor is this properly a cauſe. *(A.)*

See *Rex* v. *Gardner*. 2 Bur. 1117. *Oliver* v. *Lawrence*, 2 Stra. 946.

† *Hudſon* and *Jones*, *Mich.* 9 G. 2. Upon motion for an attachment againſt *Owen* and *Chamberlayne*, the defendant's bail below, for putting themſelves in as bail above without the knowledge of the defendant, the affirmation of *Owen*, one of the bail, who was a quaker, was offered to be read, and oppoſed: But lord *Hardwicke* ſtrongly inclined to the reading it, eſpecially as this was on the civil ſide: And he ſaid, there is as much reaſon for doing this now, as the examining him after an attachment on interrogatories. He alſo propoſed, inſtead of a rule for an attachment, a rule for anſwering the matters of the affidavit; in which caſe (he ſaid) it was clear, the affirmation might be read. But the party conſented to waive his affirmation, reſting the matter on the affidavits. *(A.)*

now

Weſt againſt *Morris.*

IN ejectment the jury were directed to find a verdict for the plaintiff, ſubject to the opinion of the court, upon the following caſe. The conſtruction of a will.

Henry Probate being ſeiſed of lands in fee of 600*l. per ann.* which he had by deſcent from his father Sir *George Probate*, joins with his ſon *Henry* (whom he had by a firſt venter) in ſettling one moiety thereof upon himſelf for life; then upon his wife for life; remainder to *Henry* the ſon for life; remainder to himſelf in fee: And the other *moiety is limited to *Henry* the ſon for life; then to his wife *Eſther* for life for her jointure; remainder to their iſſue in tail; remainder to *Henry* the father in fee. * P 202

Henry the father had alſo two daughters by the firſt venter, and one ſon (*Charles*) and one daughter (*Eleanor*) by a ſecond venter. And *Henry* the ſon and his ſaid wife having no iſſue, nor likely to have any, *Henry* the father and his ſaid two ſons, by articles dated 9 *March* 1715. agreed, that for the better ſettling the premiſſes, part of the moiety before ſettled upon the father of 200*l. per ann.* ſhould be conveyed and limited, as in the firſt ſettlement, with remainder to *Charles* in fee: And that in conſideration of 500*l.* to be paid by *Charles* to his brother

ther *Henry*, on his (*Charles*'s) marriage, and 500*l.* more on the execution of the conveyances, (both which ſaid ſums were to carry intereſt, and the firſt was to be ſecured by a truſt-term) certain lands of 100*l. per ann.* (the other part of the father's moiety) ſhould be limited, after the father's death, to *Charles* in fee. And as to the moiety of *Henry* the ſon, that was to continue ſettled as before, with this difference only, that it was to be limited in ſuch a manner as to let in the iſſue of any future wife of *Henry* the ſon; and that the laſt remainder was to be limited to *Charles* in fee.

Afterwards by leaſe and releaſe, dated 9, 10 *May* 1716. mentioned to be made in purſuance of the ſaid articles, and reciting, that 500*l.* was then paid by *Charles* to his brother *Henry*, the premiſſes agreed to be limited to *Henry* the father, *&c.* and *Henry* the ſon, *&c.* are limited accordingly, with remainders over to *Charles* in fee; and a term is raiſed out of ſuch part as is limited to *Henry* the ſon for raiſing 2000*l.* payable as he ſhall appoint, and in default thereof, to be paid to the two daughters of *Henry* the father by the firſt venter: And as to the 100*l. per ann.* articled to be ſettled upon *Charles*, that is limited to *Henry* the father for life, remainder to truſtees for ninety-nine years, *&c.* for ſecuring the
* P 203 payment of the other* 500*l.* to *Henry* the ſon, and alſo upon truſt to pay *Charles* 25*l. per ann.* in lieu of intereſt for the 500*l.* then paid by him to *Henry* the ſon; remainder to *Henry* the ſon for life; remainder to *Charles* in fee. And there is a proviſo, that on *Charles*'s paying the ſaid other 500*l.* the truſtees ſhall pay unto or account with him for the profits of the ſaid premiſſes of 100*l. per ann.* or permit him to receive the ſame. And *Henry* the ſon covenants to make further aſſurances to *Charles* in common form, and confeſſed a judgment for performance thereof.

Anno

Anno 1718. *Henry* the father died, whereupon *Charles* paid the other 500*l.* and by the conſent of *Henry* the ſon, and alſo of the truſtees, was then let into the poſſeſſion of the ſaid lands of 100*l. per ann.* and received the profits thereof. And being ſo poſſeſſed, and alſo intitled to the remainder in fee of the ſame lands after the death of *Henry* the ſon, and of other part of the premiſſes after the deaths of his brother *Henry* and *Eſther* his wife without iſſue; and being alſo ſeiſed of lands in fee of 70*l. per ann.* which he had by purchaſe.

Charles made his laſt will, dated the 24 *July* 1724. whereby he deviſes to his ſiſter *Eleanor* "all his lands, "tenements and real eſtate whatſoever and whereſo-"ever, except the reverſionary eſtates herein after "mentioned:" And afterwards reciting, "that he "was ſeiſed of and intitled unto the inheritance and "reverſions of all the eſtates both real and cuſ-"tomary of Sir *George Probate* and *Henry Probate* "after the death of *Henry Probate* and *Eſther* his "wife," and "that the ſame are now in the poſſeſſi-"on of *Henry Probate* his brother," he gives the ſame to his three ſiſters in fee, as tenants in common: And then reciting, "that the ſame reverſionary "eſtate is charged with the payment of 2000*l.* to "his ſaid ſiſters," he directs, that the ſame ſhall be looked on as diſcharged by virtue of the ſaid deviſe. The teſtator alſo gives to his ſiſter *Eleanor* all his perſonal eſtate, and makes her executrix.

Charles the teſtator dies, and then his brother *Henry* dies without iſſue, his wife *Eſther* ſurviving him. * P 204

And the ſole queſtion was, whether the ſaid premiſſes of 100*l. per ann.* paſs by the firſt deviſe to *Eleanor*, (who is the leſſor of the plaintiff) or to the three ſiſters by the laſt.

This

This caſe was once argued before: And it was now argued by Mr. *Marſh* on the part of the leſſor of the plaintiff, that in the conſtruction of wills the intent of the teſtator is to be found out and followed, if it be not contrary to the rules of law: But this laſt reſtriction is not applicable to the preſent caſe, the queſtion hereupon being about little more than mere matter of fact, *viz.* whether the teſtator conſidered the eſtate of 100*l. per ann.* as reverſionary or not. Now in the firſt place it is to be obſerved, that *Eleanor* is ſiſter of the whole blood to the teſtator; and that ſhe is moſt reſpected by him it is plain, by his giving her his perſonal eſtate, and making her executrix. And as to the conſtruction of this will, the articles are principally to be taken into conſideration, theſe being the terms of the bargain, and moſt narrowly looked into by the parties; who afterwards left them to their lawyer to be reduced into form. By theſe a fee-ſimple was agreed to be conveyed to *Charles* the teſtator after his father's death, for which he was alſo to pay 1000*l.* and which appears to have been ſince paid: And though by the ſettlement, which is recited to be made purſuant to the articles, an eſtate for life is limited to *Henry* the ſon, after the death of the father, and before the limitation to *Charles*; this is merely nugatory, being only a miſtake, which a court of equity, on the complaint of *Charles*, would have rectified. And what fully confirms the articles is the covenant from *Henry* the ſon to make a further aſſurance; and alſo his conſenting to let *Charles* into poſſeſſion; which if he had been diſturbed in, he would probably have attempted to get the
* P 205 ſettlement rectified. *But (on the contrary) he remained undiſturbed in poſſeſſion for ſix years before the making his will, by reaſon of which he muſt regard

gard the eſtate as his own. And as to the ninety-nine years term, this makes no difference in the caſe, the truſtees thereof being merely truſtees for the benefit of *Charles*. From theſe circumſtances it ſeems plain, that the teſtator intended to give the premiſſes by the firſt deviſe; and this is further apparent by the penning of the will. For the firſt deviſe is a general one, of all the teſtator's real eſtates, except the reſiduary eſtates therein after mentioned, and which are particularly deſcribed: And it is an eſtabliſhed rule, that in ſuch caſe the particulars excepted muſt be ſtrictly purſued. Now the reſiduary eſtates given by the laſt deviſe are deſcribed to be "in the poſſeſſion of *Henry Probate* the younger;" whereas the premiſſes in queſtion were never in his poſſeſſion, but, on the contrary, at the time of making the will were in the poſſeſſion of the teſtator himſelf: So that this part of the deſcription, which reſtrains the precedent general words, and ought not to be rejected, is not applicable to that eſtate. The will goes on and ſays, "and whereas the ſame "reverſionary eſtate is charged with 2000*l.*" which plainly ſhews, that the teſtator did not conſider the eſtate of 100*l. per ann.* as being reverſionary, this not being charged with that ſum. It ſeems alſo a very natural diſtribution of the eſtate of the teſtator, to give to his ſiſter of the whole blood, that part of the family-eſtate which he came to by purchaſe, and to divide the reſt amongſt all his ſiſters. As to what is ſtated, that the teſtator was ſeiſed of 70*l. per ann.* beſide the family-eſtate, that is found in order to ſhew that there are other lands that will anſwer the firſt deviſe: But then on the other ſide, if the 100*l. per ann.* be included in the firſt deviſe, there are other eſtates which exactly tally with the laſt: So that, as to this point, the parties are on a level.

It

It was argued by ſerjeant *Parker* on the other ſide, that the articles are to be thrown out of the caſe, theſe being merely executory, and reſting in covenant: But it wholly *depends on the laſt ſettlement; and
*P 206 by this the premiſſes in queſtion are limited to truſtees for ninety-nine years, and then to *Henry* the ſon for life, remainder to *Charles* in fee. It ſeems not to be material, that the teſtator was in poſſeſſion after his father's death; for as this was by the conſent of the truſtees and *Henry* the ſon, it is plain he was poſſeſſed not in his own right, but only as tenant at will to the truſtees, who might at their pleaſure have received the profits themſelves. By the words of the laſt deviſe, it alſo appears to be the teſtator's intent to paſs thereby all the eſtate of Sir *George Probate* and *Henry Probate* the father; for after reciting, that he was ſeiſed "of all the eſtates of Sir *George P.* and *H. P.*" he deviſes the ſame to his three ſiſters: But according to the other conſtruction, all the eſtate of *Henry P.* the father will not paſs by this deviſe. And although afterwards theſe eſtates are ſaid to be "in the poſſeſſion of *Henry Probate*," yet there being ſufficient certainty before, this will not be vitiated by the ſubſequent ſurpluſage. 1 *Jones* 379. S. C. *Cro. Car.* 447. 3 *Keb.* 637. As for the recital, that "the ſame reverſionary eſtate is charged with 2000*l.* *&c.* this is not an uncommon way of ſpeaking, though part of the eſtate is only charged. And it is very natural for the teſtator to give the real eſtate originally acquired by himſelf, and all his perſonal eſtate, to his ſiſter of the whole blood; and to give the whole family eſtate to the ſame ſiſter and his two other ſiſters of the half blood equally, becauſe they all ſtood in the ſame degree of kindred to the anceſtor, from whom the ſame eſtate is derived.

But

But the whole court were ſtrongly inclined in opinion, that the lands of 100*l. per ann.* are not included in the exception annexed to the deviſe to *Eleanor*, but are well deviſed to her, becauſe the exception refers to the reverſionary eſtates after mentioned in the will. Now theſe eſtates are deſcribed to be what the teſtator is intitled to "after the deaths of *Henry Probate* and his wife," and alſo "in the poſſeſſion of *Henry Probate*;" which laſt *words are a material part of the deſcription: But the 100*l. per ann.* was in the poſſeſſion of the teſtator himſelf, and this under the terms of the ſettlement, though the legal intereſt was in the truſtees; and he was alſo intitled in equity, and by the intention of parties, to an immediate fee therein. Indeed, the recital that he was intitled to the other eſtates "after the "death of *Henry* and his wife," is not ſtrictly true; but as it was not probable that *Henry* would have iſſue, it was very natural for the teſtator to drop the mention of that circumſtance. It muſt be admitted, that in wills, where there are two deſcriptions, one of which is certain and full, and the other wrong, this laſt ſhall not vitiate the deviſe: But where both are conſiſtent, and there is ſomething to which both are applicable, neither is to be rejected; and this is the preſent caſe. And that the above conſtruction is agreeable to the intention of the teſtator, is greatly enforced by the ſubſequent recital, "that the "ſame reverſionary eſtate" is charged with 2000*l.* Here too, *Eleanor* is heireſs at law; and conſequently the words ought not to be extended beyond their genuine meaning to her prejudice. And it ſeems moſt natural for the teſtator to give all the eſtate purchaſed by himſelf, part whereof is the 100*l. per ann.* to his heireſs at law; and the reſt of the family-eſtate to all his ſiſters equally.

* P 207

The

The court therefore were ſtrongly inclined to give judgment for the plaintiff: But ſolicitor general *Strange* being retained for the defendant, the caſe was adjourned for further argument. And in another day this term Mr. ſolicitor ſaid, he had conſidered the caſe, and did not think it worth while to argue it on the ſide of the defendant. Whereupon the *poſtea* was ordered to be delivered to the plaintiff.

* P 208 S. C. ante 72. Bur. S. C. 112.

**The inhabitants of Henningham* and *Finchingfield.*

If the ſeſſions refer a caſe *conditionally* to the next judge of aſſize, they muſt *continue* the appeal by *adjournment* to a future ſeſſions; elſe they cannot take it up again.

THIS caſe was now ſtirred again by Mr. *Baldwin*, and argued on the other ſide by ſerjeant *Price*: And the court were clearly of opinion, that the ſecond order of ſeſſions is not good, becauſe in it there is no judgment, but it is only a narrative of facts, and a reference to the judge of aſſize; and the concluſion is, that, "if the judge ſhall be of opinion, &c. then," &c. ſo that it is merely conditional.

The orders of ſeſſions were therefore quaſhed, and the juſtice's order confirmed.

Keſworth

Keſworth againſt *Thomas.*

MOTION by Mr. *Makepeace* to amend a declaration in ejectment, as to the time of the demiſe, and the parcels demiſed. Againſt which it was urged by Sir *Thomas Abney*, that in ejectment the parcels are never ſuffered to be altered without conſent, becauſe it may affect the rights of other perſons; and as to the time, it has always been refuſed. To which the court agreed; and they ſaid, the reaſon is, that in ejectment the declaration is in nature of proceſs; and a new one may be delivered. And therefore the motion was denied.*

Leave to amend a declaration in ejectment, as to the time of the demiſe, and the parcels demiſed, refuſed.

* See *Doe* ex dim. *Hardman* v. *Pilkington*, 4 Bur. 2447.

Eddington againſt *Wilcox.*

MOTION by Mr. *Deniſon* to amend a notice of a ſet-off, (which, he ſaid, by virtue of the ſtatute is to be conſidered as a ſpecial plea) by inſerting the words [coal mines] inſtead of [lead mines.] And this was conſented to on the other ſide. *

Notice of a ſet-off amended, by conſent.

*Barnes 294. Anon. ſuch a motion refuſed, and in *Carpenter* v. *Joynes* Prac. Reg. C. B. 21. So in *Read* v. *Blanchett*, Barnes 308. But leave was given to withdraw the plea, and to plead *de novo*, with a new notice, *ibid.*

* P 209 **The King* againſt *Mayors.*

Judgment on an indictment, for want of a plea, cannot be ſet aſide. *Semb. Rex.* v. *Hunter* 1 Wilſ. 163. S. P.

MOTION by Mr. *Ketelby* to ſet aſide a judgment upon an indictment of perjury, which was ſigned by ſurprize for want of a plea; the defendant now offering to go immediately to trial, and to ſubmit to any terms the court ſhall think reaſonable.

But the court ſaid, they did not remember any inſtance of ſetting aſide a judgment on an indictment; and that they would not do it unleſs a precedent could be produced. And (as *Chapple* juſt. ſaid) this differs from civil actions, becauſe there it may require time to conſider of, and form a proper plea; whereas here the defendant can only plead not guilty.

Afterwards, upon another day this term, *Ketelby* ſaid, that he had ſearched in the crown-office, and found that this had been done; for which he cited *The King* and *Leper*, *Trin.* 10, 11 *G.* 2. which was an indictment for battery, falſe impriſonment and extortion; and a rule was there made, upon the motion of Mr. *Eyre*, that the judgment againſt the defendant be ſet aſide, upon payment of coſts, and going to trial the ſittings after term.

But this rule appearing to have been made in the laſt day of a term, and without any preceding rule for ſhewing cauſe, the court ſaid, that it muſt have been made by conſent; and they ordered the caſe to be further inquired into. Wherefore the principal caſe was adjourned.

Rogeri,

*Rogers, on the demiſe of Dawſon, againſt Briggs. *P 210

IN ejectment a ſpecial verdict was found in effect as follows:

The word "*eſtate*" in a deviſe, held under the circumſtances of this caſe, to paſs only an eſtate for life.

Charles Hutton being ſeiſed of lands in the county of *York* in fee, and having three brothers, *Thomas* (the eldeſt) *Richard* and *Matthew*, by his laſt will, dated 1 *April* 1692. deviſed the ſame in this manner: "My mind and will is, that all my lands, houſes, "rents and profits, ſhall be and remain to myſelf for "life, and after my death to my wife for her life, "remainder to our iſſue in tail; and in default of "ſuch iſſue, then I will that my ſaid lands ſhall go "to my two brothers *Richard* and *Matthew*, to be "divided between them; and if my brother *Richard* "ſhall have no iſſue male to inherit his part, then "my whole lands and eſtate ſhall go to my brother "*Matthew* in tail male, he paying in conſideration "thereof 200*l.* to the daughter or daughters of my "brother *Richard*, and 200*l.* to the daughter or "daughters of my brother *Matthew* (if they have "any) within one year after the ſame eſtate ſhall "fall to him; and if he the ſaid *Matthew* ſhall have "no iſſue male, then my lands ſhall go to my ne-"phew *Thomas Hutton* and his heirs, he paying 200*l.* "to the daughter or daughters of my brother "*Richard*, and 200*l.* to the daughter or daughters "of my brother *Matthew*, (if they have any) with-

" in, *&c.* after my eſtate ſhall fall to him; and if " he my ſaid nephew *Thomas* ſhall have no iſſue " male, then my ſaid eſtate ſhall go to the daughter " or daughters of my brother *Richard*, and to the " daughter or daughters of my brother *Matthew*;" and if they ſhall have no daughters, then to the daughter or daughters of *Thomas* the nephew; and if he have none, then to the right heirs of the teſtator.

* P 211 *The teſtator died without iſſue, and then his two brothers *Richard* and *Matthew*, and alſo his nephew, died; *Richard* and *Matthew* leaving ſeveral children, who all died without iſſue, except *Eleanor*, the ſurviving daughter of *Richard*, who had a ſon, *Humphry Briggs*, the preſent defendant; and after *Richard* and *Matthew*, and *Thomas* the nephew, the teſtator's wife died. And the queſtion now was between the ſaid *H. Briggs* and *Thomas Dawſon*, who is the leſſor of the plaintiff, and the teſtator's heir at law, (he being the grandſon of *Elizabeth*, who was the daughter of *Thomas*, the teſtator's eldeſt brother) whether by the deviſe of the " eſtate" to the daughters of *Richard* and *Matthew*, an eſtate in fee or for life only paſſed.

This caſe was argued laſt *Hilary* term by Mr. *Bootle* for the plaintiff, and by Mr. *Deniſon* for the defendant; and this term by ſerjeant *Bootle* for the plaintiff, and ſerjeant *Wright* for the defendant.

And it was argued on the ſide of the plaintiff, that the word [eſtate,] upon the meaning of which the preſent queſtion principally depends, ſometimes ſignifies an intereſt in lands, and then it will paſs a fee; or elſe it is uſed as deſcriptive only: So that the conſtruction thereof is, in theſe caſes, to be governed wholly by the intent of the teſtator; and other parts of the will are to be taken in, in order to explain what

what he applies it to. *Cro. Car.* 447. S. C. 1 *Roll.* 834. *pl.* 14. Now that in the deviſe to the daughters of *Richard* and *Matthew*, it is uſed as a word of deſcription only, appears from the preceding parts of the will, where it is plainly deſcriptive, it being always given under a reſtriction: And in the deviſe to *Matthew*, it is coupled with the word [lands.] In another part of the will the teſtator ſays, that if *Richard* ſhall leave no iſſue male, all his "land" ſhall go to his nephew *Thomas*, he paying, *&c.* within one year after "the ſaid eſtate" ſhall fall to him; and here the words [lands] and [eſtate] muſt neceſſarily mean the ſame thing: So that throughout the *whole will theſe two terms are uſed as ſynonymous and convertible, the teſtator having probably the ſame idea in his mind when he uſed either of them. As therefore in the deviſe immediately preceding that to the daughters, a limited intereſt only paſſes, and the word (eſtate) is deſcriptive only, it ought to receive an uniform conſtruction in the deviſe now in queſtion. And this interpretation is greatly inforced by the relative word (ſaid) annexed to (eſtate) in the ſame deviſe, which muſt either refer to the quantity of eſtate, or the thing before given. It cannot relate to the firſt, becauſe an eſtate-tail is before deviſed, and conſequently it muſt refer to the lands, houſes, *&c.* mentioned in the beginning of the will. Indeed where an eſtate at ſuch a place is deviſed, a fee paſſes; but if that word be coupled with others, as all his eſtates, mortgages, goods, *&c.* a fee will not paſs; as appears by the books before cited: And yet ſubſequent words do not always controul precedent ones. *Moor.* 124. S. C. *Dyer* 171. *a.* If this was in a grant, a fee would not paſs; and a will is not to be conſtrued in oppoſition to the rules of law, where the deviſe is obſcure and dubious,

*P 212

bious, (6 *Co.* 16. *b.* 1 *Roll.* 834. *pl.* 13. 3 *Mod.* 104.) eſpecially in the caſe of an heir, who ought to be favoured, and not to be diſinherited without an apparent intention: as it was reſolved in *Shaw* and *Bull*, *(a)* 13 *W.* 3. Beſides, it is not probable that here the teſtator intended a fee for the daughters, when he gave before an eſtate-tail only to the ſons: And it appears by the will, that if he had intended it, he knew how to have done it by apt words. Upon the whole therefore, an eſtate for life only paſſed to the daughters; and they being all dead, the leſſor of the plaintiff is intitled, as heir at law, under the laſt limitation.

(a) 12 Mod. 592. 2 Eq. ab. 320.

On the other ſide it was argued, that the word (eſtate) legally ſignifies ſuch an intereſt in land as the proprietor hath therein. *Co. Lit.* 345. *a.* *Litt. Rep.*——*Skin.* 194. And in this ſenſe therefore it ought here to be taken, unleſs it plainly appears that the teſtator uſed it in a different *ſenſe. This word ought not to be conſidered as of ambiguous and doubtful meaning; for though in one part of the will (eſtate) (and lands) are coupled together, they have plainly different ſignifications; the one ſignifying the thing itſelf, and the other the ownerſhip of the thing: And ſignificant and conſiſtent words ought not to be rejected. As to the intent of the teſtator, this is to be collected from the words of the will. Now by this he gives his lands to his brothers *R.* and *M.* in moieties, without limiting what eſtate they ſhall take; and if *R.* ſhall have no iſſue male, then he wills, that all his "lands and eſtate" ſhall go to *M.* &c. ſo that the teſtator's whole eſtate is given to *R.* and *M.* and their iſſue; and therefore when he deviſes (his ſaid eſtate) to the daughters, it relates to the whole eſtate before given to the brothers in moieties; and there it imports the intereſt in the lands. The word (ſaid,) to be ſure, refers to what

*P 213

what is mentioned before; but yet it does not neceſſarily follow, that if the word (eſtate) in the firſt inſtance by ſynonymous with land, it muſt carry the ſame ſenſe in the laſt place; for the mention of it in one place may naturally occaſion the repetition of it in another, though in a different ſenſe. Beſides, by giving the eſtate firſt under a reſtriction, it is plain the teſtator knew the extent of the word, and that alone it would paſs a fee; and as there is no reſtriction in the deviſe to the daughters, this ſeems to ſhew he intended for them a fee, and not a particular eſtate: And indeed if an eſtate for life were to paſs only, it would be not the teſtator's eſtate, but part of his eſtate, which is contrary to the expreſs words of the will. The order of ſucceſſion appointed by the teſtator ſhews alſo his intent, that *Thomas* his eldeſt ſon and his children ſhould not inherit the lands till both the male and female iſſue of *R.* and *M.* ſhall ceaſe: For firſt, the premiſſes are given to *R.* and *M.* and if *R.* ſhould have no iſſue male, then the whole is to go to *M.* and if he hath no iſſue male, then to the nephew; and if he hath none, then to the daughters of *R.* and *M.* and if *they have no daughters, then to the daughters * P 214
of the nephew; and if there are no daughters, then to the heirs of the teſtator: Which laſt limitation is merely contingent and conditional, and does not abridge the preceding deviſe. *Dyer* 171. *Moor.* 124. *Cro. Car.* 185. That the word (eſtate) is ſufficient in wills to paſs a fee, appears by theſe books and caſes. 1 *Mod.* 100. S. C. 2 *Lev.* 91. 1 *Salk.* 236. 1 *Lutw.* 755. 3 *Mod.* 45. *Skin.* 193. 1 *Show.* 348. S. C. 4 *Mod.* 90. 2 *Vern.* 564. *Abr. Ca. Eq.* 178. *pl.* 18. *Ibbotſon* and *Beckwith*, *(a)* (b) Caſ. T. Talbot 157. 2 Eq. ab. 302. *Hil.* 1735. There the teſtator gives to his mother all his eſtate at——with all his goods for her life,

and

and after her death to his nephew *Thomas Dodſon*, if he changes his name; if not, 20*l. per ann.* for life only: And upon an appeal in Chancery, whether the nephew had an eſtate for life or in fee; and without laying any weight on that part of the will relating to the changing his name, it was reſolved, that he had an eſtate in fee. In which caſe it is obſervable, that the lands are meant by the word [eſtate] as it is firſt uſed; and the intereſt by it in the laſt place. But ſuppoſing that in the principal caſe the word [eſtate] is merely deſcriptive, yet the daughters will take a fee in reſpect of the pecuniary legacies which are given to them, and which never became payable, but ſunk into the eſtate, as the deviſees who were to pay the money died before the lands fell to them. Now if there had been a deviſe of the lands to the brothers or nephew generally, without any reſtraint, they would take a fee, according to *Collier's* caſe, 6 *Co.* 16. *a.* *Cro. El.* 205. S. C. 2 *Leon.* 114. S. C. 3 *Co.* 20. *b.* And by the ſame reaſon the legacies being not anſwered, the daughters are intitled to a fee in lieu thereof. A conſideration is in a manner given for it; and if they were to take an eſtate for life only, they might be loſers by the deviſe, becauſe that might have determined before they ſhould receive ſo much as their legacies amount to. *O. Benl.* 25. and *Collier's* caſe before cited. Objected, That an heir at law ought not to be diſinherited without expreſs words. Anſwer:
*P 215 Where the intent is clear, (as it *is in the preſent caſe, for the reaſons before given) that ſhall govern. And here it is obſervable, that the leſſor is in a very remote degree from the teſtator.

But

But the whole court was clearly of opinion, that an eſtate for life only paſſed to the daughters of *R.* and *M.* For (as it was argued) although in grants, and alſo in wills, the word [eſtate] is ſufficient to carry a fee, yet in this laſt caſe, where the conſequence is the diſinheriting an heir at law, a fee ſhall not paſs thereby, unleſs the intent of the teſtator is very plain and apparent for that purpoſe. And ſo (*Lee* C. J. ſaid) it was held by lord chief juſtice *Trevor* and *Powell* juſt. in *Shaw* and *Bull*, *Mich.* 13 *W.* 3. in *C. B.* where the C. J. ſaid, that in wills the words [my eſtate], or [the reſidue or overplus of my eſtate], which laſt are the words in that caſe, will carry the inheritance, if the intent of the teſtator appears accordingly; but ſuch intent muſt be very plain, either from the words of the will, or the circumſtances of the caſe, where the heir is to be diſinherited; and he cited *Noy* 48. *Style* 293. 3 *Mod.* 45. To all which *Powell* agreed. Now in the preſent caſe, the intent is not ſo apparent as to force the court to put ſuch a conſtruction on the deviſe to the daughters, as is inſiſted on for the defendants: But on the contrary, from the contexture of the whole will it ſeems plain, that the word [eſtate] is always, and particularly in the deviſe now in queſtion, uſed as deſcriptive only, and ſynonymous with lands; ſo that here it will be putting a force on it, to make it carry a fee. And beſides, the deviſe over to the teſtator's heirs ſhews, that he thought he had a farther intereſt to diſpoſe of after the deviſe to the daughters, to whom he does not ſeem to intend ſo much as an eſtate-tail. As to the argument deduced from the legacies given to the daughters of *R.* and *M.* and never become payable, that will not affect the preſent caſe: For (as *Chapple* juſt. ſaid) they cannot

Ante 212.

not poſſibly be loſers, but be the value of the lands as it may, muſt receive an advantage by taking an eſtate for life therein. And beſides, no money is
* P 216 given to the *daughters of *Thomas* the nephew, to whom the premiſſes are given in the ſame words as to the other daughters; and both deviſes are to have the ſame conſtruction. Judgment therefore for the plaintiff.

The King againſt *Holmes*.

The Court refuſes to quaſh an information exhibited at the Seſſions in *London* for exerciſing a trade, without having ſerved an apprenticeſhip.

IT was moved laſt *Hilary* term by Mr. *Marſh*, to quaſh an information exhibited at the ſeſſions in *London*, againſt the defendant, for exerciſing the trade of a founder, without having ſerved an apprenticeſhip thereto, contrary to 5 *El. c.* 4. *ſ.* 31. and he objected, (1) That the offence is here ſaid, to be committed in the city of *London*, whereas it ſhould be ſaid, "in the county and city of *London*," in order to ſhew a juriſdiction in the ſeſſions: For the court cannot take judicial notice that *London* is a county. *Stat.* 21 *Jac.* 1. *c.* 4. (2) It is ſaid, the informer gives the court "to be underſtood," inſtead of "to un-"derſtand." (3) The informer prays a moiety of the penalty, whereas it ſhould be the whole. And to ſhew that informations below may be quaſhed, Mr. *Marſh* mentioned the following precedents: *Walton* and *Goodwin*, 32 *Car.* 2. A rule was there granted for quaſhing an information for the inſufficiency thereof. *The city of Briſtol* and *Whitehead*, 6 G. 2. A rule was granted to ſhew cauſe, why an informa-

tion

tion ſhould not be quaſhed for the inſufficiency thereof; and alſo becauſe there was no affidavit: And there the ſame objection was taken as is done here, *viz.* that *Briſtol* is not mentioned to be a county. And in *The King* and *Jokeam*, which came on in the ſame term with the laſt mentioned caſe, a rule was granted to ſhew cauſe, for the quaſhing an information, for the inſufficiency thereof.

On the other ſide it was urged by ſerjeant *Draper*, that this information ought not to be quaſhed, becauſe the defendant will have his coſts, if he be acquitted thereon. And in two of the caſes cited *contra*, it appears upon *ſearch, that the informations were quaſhed for irregularity: And the other was an information for ingroſſing, wherein the ſeſſions had no juriſdiction. * P 217

And this caſe being ſtirred again the beginning of this term, *Lee* C. J. then ſaid, that he remembered no inſtance of quaſhing theſe informations for objections ariſing from the face thereof; and believed the practice to be otherwiſe: Though, he ſaid, an information may be quaſhed for irregularity. However the caſe was then adjourned, that the defendant's counſel may look after and produce precedents.

And upon another day the caſe being again moved, but without producing any new precedents, *Lee* C. J. cited *The Queen* and *Potter*, (*a*) *Eaſt.* 10 *Ann.* Where an information for exerciſing the trade of a butcher, without having ſerved an apprenticeſhip thereto, was refuſed to be quaſhed, becauſe the informer had an intereſt therein. And he ſaid, there was a caſe in *Sid.* on the ſame foundation. And on the authority of this caſe of *Potter* (though *Marſh* objected, that the ſeſſions have no juriſdiction here, as appears by the firſt exception) the court denied the motion. (*a*) Ante 175. 1 Sid. 152.

S. P. Ante 174. *Garland*, qui tam, v. *Burton*.

Cook

Cook againſt *Cook*.

Where a landlord claims rent, upon an execution againſt his tenant's goods, the Court will not relieve him upon motion, unleſs he makes out a full and clear caſe.

IT was moved laſt *Trinity* term by Mr. *Gundry*, upon the ſtatute of 8 *A. c.* 14. that the ſheriff may pay to the defendant's landlord 75*l.* out of the money raiſed by ſale of the defendant's goods, which were taken by execution on an eſtate belonging to the landlord, and then in the poſſeſſion of the defendant, the ſaid 75*l.* being due from the defendant to the landlord for one year's rent: But the caſe being very defectively ſet forth, the matter was then adjourned; and it was now ſtirred again upon the following caſe.

*P 218 *At *Lady-day* 1735. the landlord let an eſtate to the defendant for one year at 75*l.* rent, which year ended *Lady-day* 1736. and a few days before the end of the year, the tenant told the landlord, he was not able to keep the eſtate any longer, but deſired that he might have ſo much of the land demiſed as was ſufficient to depaſture ſixteen or ſeventeen cows for the benefit of his wife and children. This the landlord complied with out of compaſſion, letting the defendant keep part of the lands of about the value of 30*l.* or 40*l. per ann.* and he alſo demiſed to him the houſe and garden. The tenant's wife dwelt in the houſe, and depaſtured ſixteen or ſeventeen cows, ſometimes in one place, and at other times in another, from *Lady-day* 1736. till *January* then after, when the tenant's goods and ſtock were taken upon the

the ſame lands by virtue of an execution, no part of the ſaid rent of 75*l.* having been paid.

It was argued by Mr. *Way*, in behalf of the creditor who ſued out the execution, that the landlord is not in this caſe intitled to any thing for rent, becauſe here was no ſubſiſting leaſe at the time of the ſeizure; nor if there was a leaſe, was any rent reſerved thereon. On this account therefore nothing is to be deducted out of the money ariſing from the execution: And as the leaſe made at *Lady-day* 1735. was ended long before the execution came, no deduction ought to be made on that account; for if ſo, there may be a deduction, by parity of reaſon, of a year's rent due on any old leaſe many years ſince expired. The goods of the tenant could not here have been diſtrained: And it is plain by the 2 *G.* 2. *c.* 20. *ſ.* 8. which refers to the ſtatute now in queſtion, that under this the landlord is not intitled to rent, unleſs there be a ſubſiſting leaſe, and the goods are liable to be diſtrained.

On the other ſide it was argued by Mr. *Gundry* that here was a leaſe in being at the time of the execution, the houſe and garden being leaſed to the tenant at will: And *if any part is in poſſeſſion, it is ſufficient on this act, which ought to receive a very favourable conſtruction on the behalf of landlords. Beſides, the tenant muſt have the other part whereon the cattle fed, either as a tenant at will, or as a treſpaſſer; and he ought not, nor can, be taken for the laſt. And it appears by *Co. Lit.* 4. *b.* that if *herbagium terræ* be let, it is a leaſe of the ground itſelf: And there may be a moveable leaſe as well as a moveable freehold. *Co. Lit.* 4. *a.* It is not neceſſary that the contract on which the rent is due ſhould be ſubſiſting at the time of the execution, the words of the ſtatute being, "are or ſhall be due:" And

* P 219

as

as no rent appears to be reſerved upon the laſt contract, the landlord is intitled to the year's rent due upon the firſt.

But the court were clearly of opinion, that the landlord is not here intitled to relief, it not being ſtated, whether the rent reſerved by the firſt contract was payable half-yearly, or how; nor whether any rent was reſerved on the laſt contract, and how payable: And therefore as he has not ſhewn a full and clear caſe, he is not relievable by way of rule, which is a new and modern method of taking advantage of this act, but muſt reſort to an action. And *Lee* C. J. ſaid, the firſt inſtance of bringing an action was the caſe of ——— and *Wyndham* (*a*) in *C. B.* which was afterwards brought by writ of error into this court.

(*a*) *Wyndham* and *Palgrave* Fort. 372. Stra. 212. Litt. Ent. 46.

And (*per Probyn* juſt.) if any rent was reſerved by the laſt contract, and it was payable half-yearly, this half year's rent muſt be included in the year's rent which the landlord ought to have, if he be indeed intitled to any, for he cannot pick out what time he pleaſes, but the ſtatute muſt be underſtood of the year's rent immediately due before the execution.

And *Chapple* juſt. ſaid, he doubted, whether the landlord is entitled to any rent under this act, becauſe the land occupied under the laſt contract is only part of what *was demiſed by the firſt: ſo that the premiſſes leaſed by both contracts are different.

* P 220

But the court denied the motion, for the firſt mentioned reaſon.

The

The King againſt *Biſhop.*

MOTION by Mr. *Taylor* to quaſh an indictment for keeping an houſe to entertain vagrants and other lewd and diſorderly perſons in; and it was averred, that the defendant did ſuch a day in the night-time lodge divers beggars and diſorderly perſons: And Mr. *Taylor* objected, that it is not mentioned that the defendant lodged "in his houſe." And though it be ſaid, he kept an houſe to entertain, *&c.* it is not averred, that he did entertain, *&c.* Beſides, it is no offence to harbour beggars.

The Court will not on motion, quaſh an indictment for a nuiſance. Ante 148. 274.

But this matter being laid as a nuiſance, the court refuſed to quaſh the indictment; but put the party to a demurrer.

S. P. *Rex.* v. *Sutton.* 4. Bur. 2116.—2 Ld. Ray. 1164.

The

The King againſt *Caper and another.*

Writ of *Excommunicato capiendo* to hold two defendants (excommunicated for diſtinct offences) 'till *they* have made ſatisfaction, quaſhed: for under it, *neither* could be diſcharged, 'till *both* had made ſatisfaction. The writ may be quaſhed without the party's bringing an *Habeas corpus*. V. 1 Ld. Ray. 619.

(*a*) *Rex* v. *Keat* 2 Stra. 950. 2 Kely 132.

MOTION by Mr. *Patridge* to quaſh an *excommunicato capiendo* againſt two women. To which it was objected by Mr. *Lloyd*, that the parties ought firſt to appear upon an *habeas corpus*: And he cited *Salk.* 294. But this objection the court immediately over-ruled. And it was thereupon excepted to the writ, (1) That here is no addition, as there ought to be by 5 *El. c.* 23. (*ſ.* 13.) *Salk.* 294. It is not ſo much as ſaid, whether the defendants are ſpinſters, married women or widows; either of which is a good addition upon this act. *Digeſt of orig.* **writs*, *lib.* 6. *cap.* 15. *pl.* 4. (2) It is uncertain for what crime the defendants were proceeded againſt below, the words being, ——— "adultery, forni- "cation or incontinence:" Whereas it ſhould in theſe caſes be ſhewn, not only that the ſpiritual court has a juriſdiction in the original cauſe, but alſo poſitively for what particular crime the party is ſued. And there was a caſe (*a*) where an *excommunicato capiendo* was prayed to be quaſhed, becauſe the words were, "defamation or ſlander;" but the court refuſed it, becauſe theſe two words are merely ſynonymous. (3) By this writ the ſheriff is commanded to hold theſe two defendants "until they have made ſatis- "faction;" ſo that if one of them alone makes ſatisfaction, ſhe cannot be diſcharged: And yet it appears that the ſuits againſt them were ſeparate; for it it is ſaid ——— "for adultery, &c. reſpec- "tively." (4) There being two diſtinct ſuits, and

alſo

also two defendants, there ought to have been two writs. (5) The parties are excommunicated for contumacy in not appearing "before him [the bi-"shop], his deputy or surrogate, or some other "competent judge appointed."

On the other side it was answered, (1) That the statute of *Eliz.* doth not extend to this case, because the defendants are only excommunicated for non-appearance, and the act requires an addition only where there is a penalty. (2) As the defendants are excommunicated not for adultery, fornication or incontinence, but for contumacy in not appearing, the objection of uncertainty is not material. And besides, all those crimes are of ecclesiastical cognisance. (3) If one of the defendants makes satisfaction, she is discharged of course: And the word [they] is to be understood separately. (4) The defendants may and are guilty of one contempt, though there are two suits below. (5) The words, "before him, his deputy "or surrogate," are agreeable to the constant form.

But the court were clearly of opinion, that the third exception is fatal, because, according to the words of the *writ, if one defendant makes satis- * P 222
faction, she must notwithstanding remain imprisoned until the other satisfies also. And here (as *Lee* C. J. observed) the parties being women, the crimes must necessarily be distinct.

And therefore upon this exception singly, (without giving any opinion upon the others) the court quashed the writ. But *Lee* C. J. seemed also to think the want of an addition a material objection. And *Probyn* just. said, as to the second exception, that though the crimes mentioned in the writ are in the disjunctive, yet as they are all of ecclesiastical jurisdiction, it is well enough.

S.C. 1 Stra. 1095.

Rice againſt *Oatfield.*

In Ejectment for lands in *Ireland*, the leſſor of the plaintiff intitles herſelf as heir of A. who had been a papiſt and had conformed. The defendant makes out a title under the will of A. The plaintiff, in reply may ſhew by parol evidence that A. died a papiſt, and therefore his will void.

IN ejectment in the King's Bench in *Ireland*, the plaintiff obtained a verdict; after which a bill of exceptions was tendered by the defendant to the plaintiff's evidence, and received: And it being now brought into this court with the record, the caſe appeared to be in effect this:

Upon the trial of the cauſe the plaintiff gave in evidence, that *Edward Rice* was ſeiſed of the lands in queſtion in fee; and being ſo ſeiſed died a papiſt *anno* 1715. leaving behind him *Edward* his eldeſt ſon, and two other ſons; that *Edward* the ſon, within a year after his father's death, renounced the popiſh religion, and duly conformed to the church of *Ireland*; and that 1720. *Edward* the ſon died ſeiſed, *&c.* leaving iſſue only *Mary*, the leſſor of the plaintiff. On the other ſide the defendant gave in evidence, that *Edward* the ſon 1720. made his laſt will, whereby he deviſed the premiſſes to *Jacob*, one of his brothers, for life, with a power to make a jointure, with remainders over; that *Jacob*, after the death of his brother *Edward*, duly conformed to the church of *Ireland*; and afterwards by bargain and ſale, in conſideration of a *marriage intended, and afterwards had, with the defendant, ſettled the premiſſes on the defendant for life for her jointure, *&c.* and that *Jacob* enjoyed the ſaid lands from 1720. when *Edward* the ſon died, until 1733. when

* P 223

when *Jacob* died, leaving iſſue a ſon; and that the defendant was a proteſtant. Upon this the plaintiff, in order to ſet aſide the will, offered to prove by witneſſes, that *Edward* the ſon died a papiſt; but no record of conviction being produced to ſhew that he was perverted, it was objected by the defendant, that proof by witneſſes ſingly ought not to be admitted. It was however allowed, and the plaintiff thereupon obtained a verdict.

And it was now aſſigned for error by Mr. *Bootle*, (1) That as the plaintiff below firſt gave evidence that *Edward* the ſon renounced the popiſh religion, and conformed to the church of *Ireland*, he ought not to be admitted afterwards to prove that *Edward* the ſon died a papiſt, theſe being facts quite inconſiſtent. (2) It is to be intended that the name of *Edward* the ſon, upon his conformity, and alſo a certificate thereof, were inrolled; (theſe being required by the *Iriſh* ſtatutes of 2 *A. c.* 6. and 8 *A. c.* 3.) and conſequently as his conformity ſtands verified by record, the contrary ought not to have been ſhewn by parol evidence only, this being againſt the known rule of law, [And *Cro. El.* 575. and other caſes of the like nature, were mentioned to this point.] And it cannot reaſonably be objected, that there could be no proof by record of the relapſe of *Edward* the ſon, for he might have been proſecuted for a recuſant, or upon the *Iriſh* act of 8 *A.* Beſides, he being dead, it ought not to be admitted to be proved now that he was a papiſt, no more than baſtardy can be proved after the death of the baſtard. *Co. Lit.* 243, 244. It would alſo be attended with many ill conſequences, if this evidence founded on record, may be overturned by parol proof; and this too after the death of the party: As hereby purchaſes

made for a valuable conſideration are liable to be
* P 224 avoided, and much perjury will be *introduced, together with the other miſchiefs intended to be remedied by the ſtatute of frauds.

On the other ſide it was argued by Mr. *Thomas Clark*, who cited, as a caſe in point upon the ſecond objection, *Cloſe* againſt *Roſs and Gordon*, (a) in the houſe of lords, *February* 1729. There a purchaſe having been made by the plaintiff *Cloſe* of an eſtate from Sir *George Maxwell*, a bill was brought in the court of Chancery in *Ireland*, to prove that Sir *George*, who was dead, was a papiſt; to which it was pleaded, that Sir *George* was born of proteſtant parents, and was educated a proteſtant, and that he was never convicted of being perverted to the *Roman* catholic religion: But this plea was over-ruled there, and that judgment was affirmed here in the houſe of lords.

(a) Poſt. 237—3 Bro. P. C. 473.

And in the principal caſe the court were unanimouſly and clearly of opinion, that both the errors now aſſigned are immaterial. For (1) There is no contradiction in the evidence given by the plaintiff below, becauſe a perſon may be a proteſtant at one time, and a papiſt at another: Which is the caſe he has attempted to ſhew. And *Probyn* juſt. ſaid, that a party may, and often does, give contradictory evidence; as in the caſe of a will, where a witneſs called by the party claiming under it ſwears, that it was not duly executed, yet he may call others to ſhew the contrary†, which is a common caſe. (2) No conviction of the teſtator's being a papiſt was neceſ-

† *Pike* v. *Badmering*, cited poſt. 237. 2 Stra. 1096.—See an extraordinary caſe on this point, *Lowe* v. *Joliffe*. 1 Blacſt. 365. See Skin. 79. 413.—S. P. as to a deed, Doug. 205. 206. and ſee Skin. 639. 4 Bur. 2224. 2225.

ſary

ſary to be produced, either by the rules of law, or by act of parliament: Not by the firſt, becauſe the record of the party's conformity is not falſified, or attempted to be falſified, by the parol evidence of his being afterwards a papiſt; both of which are very conſiſtent, as is before mentioned: Not by act of parliament, becauſe, although a conviction is hereby made neceſſary, where a corporal or pecuniary puniſhment is inflicted, yet in order to be diſabled from making a will, the only thing required is, that the perſon is a papiſt, without ſpeaking of a conviction; and that is a fact very proper to be proved by witneſſes. *And ſuppoſing that in this caſe there never was ſuch a conviction, the evidence given ought to be allowed, becauſe it is then impoſſible that any other ſhould be given. As to the caſe of baſtardy, to which this has been compared, that is a peculiar one; the reaſon thereof probably being, (as has been mentioned by the defendant's counſel) that when the legiſlature refuſed to conform the laws of the realm to the eccleſiaſtical laws, for the legitimating of iſſue born before marriage when that followed, the judges would go as far as they poſſibly could towards ſuch conformity. And the two caſes are very unlike, becauſe the religion of the teſtator muſt neceſſarily be inquired into after his death, as the validity of his will could not come into queſtion before. And (as *Chapple* juſt. obſerved) here the objection is, parol evidence ought not to be admitted; whereas there no evidence at all can be allowed. * P 225

After the court had delivered their opinions, ſerjeant *Eyre* (who was retained for the plaintiff in error) objected, that it appears here the teſtator was once a proteſtant, and that he died a papiſt, ſo that (for ought appears) he might have been a proteſtant at the time of making the will; and if ſo, it may be a queſ-

a queſtion well worth conſidering, whether, on conſtruction of all the acts of parliament relating to this ſubject, this may not be a good will. In anſwer to this new point, Mr. *Clark* cited *Blake* and *Burk* (*b*) in the houſe of lords, *January* 1717. where it was ſolemnly determined, that a will made by a papiſt before the act of parliament, was avoided by the act.

(*b*) *Burk* v. *Morgan ex dim. Blake* 2. Bro. P. C. 34.

And the court ſeemed ſtrongly inclined for the defendant: But counſel being retained for the plaintiff, an *ulterius conſilium* was granted. S. C. *poſt.* 235.

Note—By the *Iriſh* Statutes, 17 & 18 *Geo.* 3. *c.* 49. *ſ.* 2. and 21 & 22 *Geo.* 3. *c.* 24. *ſ.* 1. lands, &c. of papiſts are deſcendible, deviſable and transferrable in like manner as the lands of proteſtants.

Trinity

*Trinity Term, *P 226

11, 12 Geo. II. 1738.

Sir *William Lee*, Chief Juſtice.

Sir *Francis Page*,
Sir *Edmund Probyn*, } Juſtices.
Sir *William Chapple*,

The King againſt *Leaſe*.

MOTION by Mr. *Taylor* to quaſh an indictment againſt defendant, for ſaying to one *Soane*, a juſtice of peace, upon his being brought before him and another juſtice, by a warrant granted by *Soane* for not paying ſervants wages, "you do not do right." And it was objected, that the ſpeaking theſe words is not any offence; the meaning thereof being, that the juſtice did not act right in granting this warrant: Which is very true, becauſe juſtices have only a juriſdiction in the caſe of wages of huſbandry; and this is not ſhewn to be the caſe here, nor is the court to intend it.

Indictment for words ſpoken to a juſtice of peace, quaſhed.—It ought to be laid that the words were ſpoken to him in the execution of his office. Poſt. 273.

On

is an unjuſt magiſtrate. And indictments of this kind ought not to be quaſhed, any more than indictments for nuiſances, as it tends to contenance perſons in inſulting magiſtrates.

*P 227 *But the court quaſhed the indictment. And *Lee* C. J. objected, that it is not here laid, the words were ſpoken to the juſtice in the execution of his office.

S. C. cited Buller's N. P. 136.

Norwood againſt *Stevenſon and Elizabeth his wife.*

In *aſſumpſit*, one defendant ſued as huſband to the other pleads that they never were joined in lawful matrimony. This plea is bad; for a marriage *de facto* makes him liable. Such plea is good only in dower and appeal.

ACTION on the caſe by an executor, upon ſeveral promiſes made by the wife to the teſtator before coverture: To which *Stevenſon* (the huſband) pleads, that he and *Elizabeth* were never joined in lawful matrimony. The plaintiff demurs, and aſſigns for cauſe, that the plea ſhould have been in abatement, and not in bar; and alſo that the defendant hath endeavoured to draw a matter cognizable in the ſpiritual court, within the juriſdiction of this court. And as to *Elizabeth*, ſhe appears, &c.

It was argued by ſerjeant *Draper* for the plaintiff, that "*ne unques accouple en loyal matrimony*" is a matter triable by the ordinary; and is pleadable only in appeal and dower, but not in theſe actions where the fact, and not the legality of the marriage, ought

ought to be denied; it not being material whether the marriage be legal or not: Whereas in this caſe, a marriage *de facto* is admitted. 2 *Roll.* 584, 585. 1 *Show.* 50. S. C. 2 *Salk.* 437.

On the other ſide it was argued by ſerjeant *Wynne*, that there is no difference between pleading no marriage generally, and no lawful marriage; both meaning the ſame thing. And although in dower and appeal the matter here pleaded is triable by the biſhop only, yet in perſonal actions it is a proper iſſue to the country. *Cro. Jac.* 102. S. C. 2 *Roll.* 585 *pl.* 18, 21. *Same book and page, pl.* 17. 1 *Lev.* 41. *Brown's Entr.* 4. *pl.* 20. *Aſton's Entr.* 9. *Vidian's Entr.* 77. *Cliſt's Entr.* 23. 1 *Lutw.* 23.

*But the whole court were clearly of opinion, (for the reaſons, and upon the authorities mentioned by the plaintiff's counſel) that this is an ill plea. And *Lee.* C. J. cited from a manuſcript report, as a caſe in point, *Mitchell & ux'* againſt *Garrett*, (*a*) *Mich.* 11 *W.* 3. in *K. B.* (which is alſo reported in 3 *Salk.* 64. a book, as C. J. ſaid, of no authority.) That was an action by plaintiffs as huſband and wife, for a cauſe ariſing before marriage: Defendant pleaded, "*nunquam legitimo matrimonio copulat.*" To which the plaintiff replied, that they were married: And on demurrer hereto the plaintiffs obtained judgment, becauſe the plea is naught. And *Probyn* juſt. ſaid, the reaſon why the legality of marriage is not triable in perſonal actions, as it is in appeal and real actions, is, that an huſband *de facto* is liable to his wife's debts, and intitled to her property. Judgment for the plaintiffs. * P 228

(*a*) 12 Mod. 276.

Smith

Smith againſt *Wilſon.*

Ante 187. IT was now declared by *Lee* C. J. that Mr. juſtice *Chapple*, who formerly doubted in this caſe, concurred now in opinion with the reſt of the court. And therefore judgment was given for the defendant.

The King againſt *Staples.*

Information granted for printing in a news-paper, that a juſtice of peace was "ſcandalouſly guilty of telling a lye in divers companies."

AN information was prayed by ſolicitor general *Strange* againſt the defendant, for printing in a news-paper, called *The York journal*, that *Richard Thomſon*, an alderman of *York*, and a juſtice of peace, was "ſcandalouſly guilty of telling a lye in divers companies," *viz.* that the ſaid *Staples* had aſked Mr. *Thomſon*'s pardon for publiſhing in the ſame news-paper, that he (Mr. *Thomſon*) was married to one Mrs. *W.*

*On the other ſide it was argued by ſerjeant *Price* and Mr. *Willbraham*, that this charge doth not affect Mr. *Thomſon* in his office; nor is there any thing of malignancy in it, it being only an uncourtly manner of expreſſing, that *Thomſon* had ſpread about falſly, that *Staples* had aſked his pardon, &c. and for the publiſhing this there appears to have been a ſufficient provocation. Beſides, an action will not lie

* P 229

lie for theſe words, and conſequently no information ought to be granted. And on this ſide were cited the following caſes: *The caſe of libels*, 5 *Co.* 125. *King* and *Jenner*, *(a) Mich.* 2 *G.* 2. Motion for an information for publiſhing an advertiſement, whereby one *Haywood*, a wine-merchant, was charged with ſelling brandy and ſtrong liquors by quarts, pints and half-pints, and with ſelling ſalve for curing womens breaſts, made by a relation of his in *Dublin*; but it was denied. *King* and ———* 8 *G.* 1. An information was prayed againſt a perſon for advertiſing, that an apothecary had counterfeited Dr. *Crew*, and had taken fees; but refuſed. *King* and *Elms*. Motion for an information againſt one for advertiſing, that a wife had eloped from her huſband; but denied: Which caſe was cited by *Lee* C. J in *The King* and *Bailey*, *Hil.* 8 *G.* 2.

(a) 2 Barnard. 183. 2 Kely. 250.

But the whole court were clearly of opinion, that the words in the principal caſe are libellous; nothing tending more to breach of the peace, and to bloodſhed, then the word (lye,) as nothing elſe (as *Probyn* juſt. ſaid) can be anſwered to it. But (by *Lee* C. J.) if the defendant had only denied his having aſked pardon of *Thomſon*, though this would be charging him with ſaying an untruth, it would not have been a ſufficient ground for an information. And the C. J. alſo ſaid, that the caſes cited differ from this: For in *The King* and *Jenner*, the party was charged with a matter which did not include any guilt. And in the *apothecary's caſe*, though the accuſation of his having counterfeited another was certainly libellous, yet the court refuſed an information, becauſe he appeared to be guilty of it. And in *The King* and

Hob. 120.

* *Rex.* v. *Bicherton*, Stra. 498. S. C. The information was refuſed for want of an exculpatory affidavit.

Elms,

Elms, the *application was by the husband; and the advertisement did not contain any thing criminal in him. And (by *Page* just.) an information ought the rather to go in this case, because no action lies. And it is also an aggravation, that these words are spoken of a magistrate; for words spoken of a magistrate may be libellous, when they are not so in the case of a private person: And he cited to this point Sir *Lionel Wallden*'s case, (*b*) who was a justice of peace, and brought an action for being called papist; and it was held to be maintainable, because the words were spoken of a magistrate, although it would not have been so in the case of another person.

* P 230

See *Rex* v. *Darby*, *Comb.* 65.

(*b*) *Sir. Lionel Wallden* v. *Mitchell*, 2 *Vent.* 265.

The court therefore granted an information.

The King against *Burkett.*

Indictment, for maintaining a cottage, without four acres of ground, quashed—for not setting forth that it was presented "on the oaths of 12 good and lawful men"—

IT was moved last term by serjeant *Bootle*, to quash an indictment for maintaining a cottage without laying four acres of ground thereto, contrary to 31 *El. c.* 7.* because (1) It is said only, that "it was presented," without adding, as it should have been, "on "the oaths of twelve good and lawful men." (2) It is said, that the defendant did maintain a cottage "for "habitation," without shewing that any person inhabited it; and the words of the statute in relation to the ground are, "to be used and occupied with the same:" So that an actual habitation is necessary.

and for not stating an actual occupation. See 1 Mod. 295. S. P. 2 Bulst. 264.—1 Saund. 135. Skin. 564.

* This statute was repealed by 15 *Geo.* 3. *c.* 32.

And

And this matter being now ſtirred again, the rule before granted to ſhew cauſe for quaſhing the indictment was made abſolute, without any one's oppoſing it.

*The King againſt *Soleguard and another.*

*P 231 S. C. 2 Stra. 1097.

An information granted againſt a captain of a man of war, in commiſſion, lying at *Portſmouth*, for preventing the coroner of *Portſmouth* from holding an inqueſt on board the ſhip, upon a perſon who had hanged himſelf in the cabin; no inquiſition having been held by the admiralty coroner.

AN information was prayed againſt one *Soleguard*, captain of the *Berwick* man of war, and alſo againſt the boatſwain thereof, for refuſing to let the coroner of *Portſmouth* and his jury to come on board the ſaid ſhip, in order to take a view (and inqueſt thereon) of the body of a perſon who had hanged himſelf in the cabin of the ſhip, whilſt ſhe was at her moorings in water five fathom deep, and going to the dock to be cleared. And it appeared on the affidavits produced, that the ſhip was in full commiſſion when this accident happened; that the body was removed from the place where it was found hanging, to prevent infection; and that the captain refuſed to ſuffer the coroner to take a view of the body in the ſhip, but only offered to let him take it on ſhore, and afterwards to come and ſee the place where the perſon died: And it alſo appeared that the body was buried ſecretly, and that the captain took ſeveral depoſitions relating to the fact, and ſent them up to the admiralty; but it was not ſworn that he cauſed any inqueſt to be taken.

It was argued againſt this motion by Dr. *Paul*, (the King's advocate) Sir *Edmund Iſham*, a civilian, and ſeveral common lawyers, that it is eaſy to be proved

proved from the laws of *Oleron*, and the ordinance made at *Queenſborough*, and other ancient books of the civil law, that the admiralty hath juriſdiction within the place where this accident happened; but however as this point is to be determined only by the authorities of the common law, they ſaid, they would confine themſelves to theſe: And the following were cited. *Stat.* 15 *R.* 2. *c.* 3. *Exton's juriſdiction of the admiralty*, *c.* 19. 4 *Inſt.* 137. *Stat.* 28 *H.* 8. *c.* 15. 3 *Inſt.* 113. 5 *Co.* 107. *a.* *Hale's P. C.* 16. *Hawk. P. C. B.* 2. *c.* 9. *ſ.* 14. *Mich.* 28. *Car.* 2. An action was brought by the earl of *Saliſbury*, as lord of the manor of *Redriff*, againſt the marſhal of the admiralty and others, for hindering
* P 232 the *coroner of *Surry* to take an inquiſition of one who was killed by the falling of a ferry in the *Thames*; and there was a verdict for the defendants. (Which caſe Sir *Edmund Iſham* ſaid, he had from a note in the admiralty.) And he ſaid, that about two years before this laſt caſe, a queſtion of the ſame nature came on before lord *Hale*; but he declaring that the admiralty had a juriſdiction, it was not entered into. He alſo cited an opinion of the judges, upon a reference from the Queen in council, *anno* 1713. (which is regiſtred in the admiralty) and the opinion is founded on conſideration of the ſtatutes of 5 *El. c.* 5. and 13 *Car.* 2. *c.* 9. and it is, that the admiralty hath a juriſdiction in all great navigable rivers from the bridges to the ſea; and that the ſaid ſtatute of *Car.* 2. is made for the government of ſhips, as well in time of peace as of war, and that perſons are puniſhable by martial law for the offences therein mentioned, which are committed either in the one or the other. This is ſigned by ten judges; *Ward* chief baron, and *Gould* juſt. *diſſentientibus*; they being of opinion, that the admiralty

miralty hath juriſdiction, not *a pontibus*, but from the points only. Suppoſing therefore that the admiralty hath here a juriſdiction, the power of taking a view and inqueſt belongs to the admiralty-coroner, who is generally the judge's marſhal, he being only a deputy to the judge, who derives his authority from the lord high admiral. And ſeveral clauſes in the letters patent granted to the late prince *George* of *Denmark*, and afterwards to the earl of *Pembroke*, (creating them lord high admirals) and alſo to the judge of the admiralty, were read, to ſhew that theſe perſons have the ſame office of coroner by ſea, with thoſe who are coroners by land. Sir *Edmund Iſham* alſo produced the following inſtances of inquiſitions, before the admiralty-coroner, taken out of a large bundle of them in the admiralty, *viz.* one of a maid ſervant, who fell into the *Thames* as ſhe was waſhing her mop, and was drowned: Another, of a man who was drowned in coming from *Wapping-wall*: Another, of a man who was ſtabbed upon ſhore, and was found in the *Thames*: And laſtly, another who fell from the ſhore into *the ſame river. It was alſo argued, that in the ſtatute of 28 *E.* 3. *c.* 6. of coroners, there is a ſaving to lords and others, who ought to make coroners, of their ſeigniories and franchiſes. And in this caſe it is a material circumſtance, that the ſhip was in full commiſſion; there being no inſtance of a land-coroner going aboard a ſhip in full commiſſion. (Of which an affidavit was produced.) Beſides, it appears here that the coroner was offered a view of the body in the ſhip, but was denied only to ſit therein as a court: And it is not neceſſary to take an inquiſition on the ſpot where the view is had, but it may be taken in any other place afterwards. *Stat. de officio coronatoris*, 4 *E.* 1. *Latch* 166. S. C. *Poph.*

* P 233

Popb. 209. *Comb.* 386. And as this is a mere matter of right in queſtion, it is more proper to be tried in an action, or a *quo warranto*, than in an information for a miſbehaviour.

On the other ſide it was argued by ſolicitor general *Strange* and Mr. *Willbraham*, that the admiralty hath no juriſdiction, but only *ſuper altum mare*, unleſs it be in the caſes of murder and maihem, and this by ſtatute of *R.* 2. 4 *Inſt.* 137, 141. *Owen* 122. *Moor* 892. *Hale's P. C.* 171. And where both the ſtroke and death are on the ſea, the admiralty hath only a concurrent juriſdiction. *Hale's P. C.* 16, 54. In ſuch caſe therefore if the admiralty-coroner refuſes the other coroner to take an inquiſition, and doth not take one himſelf, it is a great miſdemeanor; and this is the preſent caſe. As to the objection, that the ſhip was here in full commiſſion; this makes no difference, becauſe the juriſdiction ariſes only from the place. *Hob.* 213. And it is very plain that the coroner hath a right to go to the place to ſee the body before its removal; and if he omits this, he is actually fineable, though he may adjourn the court to another place to take depoſitions. *Stat. de officio coronatoris*, 4 *E.* 1. *Bracton* 121. *Fleta*, *lib.* 1. *c.* 25. *Stat.* 33 *H.* 8. *c.* 12. 2 *Hale's Hiſt. P. C.* 58. And in the earl of *Eſſex's* caſe, (who was killed in the *Tower*) there was a great complaint made, that the body was dreſſed, and removed from the room and *poſition it was in
* P 234 when it came to its end, before notice was given to the coroner. As to what is here ſaid, that an action may be brought, this will be no ſatisfaction to the publick.

And the whole court were clearly of opinion, that an information ought to be granted: For ſuppoſing that the admiralty hath a juriſdiction in the place.

now

now in queſtion, (of which no opinion was given,) yet (they ſaid) it is plain by the caſes which have been cited, (with which *Stamf. P. C.* 51. *b.* agrees) that the land-coroner hath a concurrent one. In the ſtatute of *R.* 2. which gives the admiralty a juriſdiction in great rivers in the caſes of death and maihem, there are no excluſive words of the coroner of a county, and conſequently his ancient juriſdiction remains; neither is any mention therein made of a ſhip's being in or out of commiſſion, which (as *Lee* C. J. obſerved) ſeems to be a diſtinction founded only on the laſt proviſion in the ſtatute of *Car.* 2. nor can this make any difference in the preſent caſe, unleſs the judge of the admiralty hath actually appointed a deputy-coroner to be in the ſhip when in commiſſion, which doth not appear. In this caſe then the land-coroner hath been refuſed the executing a lawful authority, and without any inquiſition being taken on the other ſide. And (as *Probyn* juſt. ſaid) in the caſe of a concurrent juriſdiction, he who firſt exerciſes it, ought not to be hindred or interrupted therein; and his execution thereof is a good excuſe to the other in not doing any thing in the matter. And ſuppoſing that the admiralty hath in this caſe the ſole juriſdiction, here hath been a great breach of duty.

The court ſaid further, that though no imputation is here laid on the captain as wilfully oppoſing juſtice, but only as acting under a miſapprehenſion of having a right to do as he hath done; yet as this is a matter of great and publick concern, an information is proper. For (as *Lee* C. J. ſaid) an information is grantable not only where things are done maliciouſly or forcibly, but alſo where *perſons are hindred or refuſed the exerciſing a lawful authority, as where a *mandamus* is not complied with: Though in caſes of * P 235

a private nature, where there hath been no apparent design of doing wrong, an information hath indeed been often denied. And C. J. said, that it seems very difficult to maintain an action in this case; and that he remembered a case, where an action was brought for refusing to admit a person into a vestry-room; and it was greatly debated, whether the action was maintainable, but never determined.

Phillibrown v. Ryland & al', 2 *Lord Raym.* 1388. Stra. 624. 8 Mod. 52. 351.

It was also said by the C. J. that in case of an untimely death, a view ought to be had as soon as may be after the fact committed, and (if possible) whilst the body is in the same position, and other circumstances, it was in when the person died; and it is the duty of persons in whose houses such accidents happen, to give immediate notice to the proper officer for this purpose: But in the present case, he said, a good reason is given for removal of the body, *viz.* that this was done to prevent infection.

An information was therefore granted against the captain, but not against the boatswain; nor was it much pressed against him by the prosecutor's counsel, as he acted only by the order of the captain.

S. C. ante 222. 2 Stra. 1095.

Rice against *Oatfield.*

THIS case being now mentioned again, a new objection was started by serjeant *Eyre* on the side of the defendant, *viz.* that it appearing that *Edward* the grandfather died a papist, leaving three sons of the same religion, the lessor's father, who was one of them, could take only one third part of the lands

lands in queſtion by the *Iriſh* ſtatutes, and the wife of *Jacob* and her ſon are intitled to part thereof; and therefore as the demiſe in the declaration is of all the lands, the judgment, which *purſues the declaration, is erroneous. But, he ſaid, as to the queſtion on the bill of exceptions, that, on peruſal of all the *Iriſh* acts, none ſeems to come up to that point; and as it was fully ſpoken to on the former argument, he ſhould ſay nothing on that head. And he obſerved, that on this bill of exceptions, (which is part of the record) it appears that the widow of *Jacob*, to whom the premiſſes are deviſed, and her heir, are both proteſtants; and it is hard that they ſhould be defeated of having the eſtate by an act made for preventing the growth of popery, and that a papiſt ſhould take it: For if *Edward* the teſtator died a papiſt, the leſſor of the plaintiff muſt be intended to be one too; all the children of papiſts being to be taken for papiſts by the ſtatute of 2 *A.* until a conformity. He further ſaid, that perſons diſabled by the *Engliſh* act of *W.* 3. from taking, are notwithſtanding capable of deviſing; and ſo it was determined in the caſe of *Mellam* and *Brinſlow* laſt term; but the *Iriſh* act is different.

* P 236

11, 12 W. 3. c. 4. ſ. 4.

On the other ſide it was argued by ſolicitor general *Strange*, that the objection now taken is fully anſwered by the clauſe immediately following that on which the objection is founded: For there it is provided, that if the eldeſt ſon of a papiſt renounces the popiſh religion, and conforms, *&c.* within one year after the death of his father, the lands ſhall deſcend as at common law: And here it appears that the father died 1715. and that the ſon renounced within one year after his death. And as to the objection taken on the former argument, that the plaintiff's evidence is inconſiſtent, he cited the caſe of

Pyke and *Badmarring*, *(a)* which was an ejectment, and was tried at the bar about eight or ten years ſince. There the queſtion was between the deviſees of lands and others; and every one of the three ſubſcribing witneſſes to the will denying the execution, there was an endeavour, on the ſide of the deviſees, to maintain the will, without calling any of them: But the court inſiſted upon hearing theſe firſt; and they all denied their hands. Whereupon it was urged, that the party could not call other
* P 237 *perſons in oppoſition to his own witneſſes: But the court admitted other evidence; for that a man ſhall not loſe his cauſe through the iniquity of his witneſſes. As to the other objection, that a record of conviction ought to have been produced; it was anſwered, that if this be neceſſary, the act of parliament will be defeated: For a perſon muſt be a papiſt at the time of his death, in order to invalidate his will; and therefore if there had been a conviction a month before his death, it would not have been ſufficient; and there cannot be a conviction after his death. Such evidence was therefore given as the nature of the thing would admit of. And the ſtatute ſpeaks nothing of a record. And Mr. ſolicitor cited the caſe (mentioned on the former argument) of *Roſs* and *Cloſe*, *(b)* 2 *February* 1729. in the houſe of lords. The appellant claimed by a purchaſe under Sir *George Maxwell*. The reſpondent anſwered, that he was a papiſt; to which it was replied, that he was never convicted: And it was held, that this was not neceſſary.

(a) Ante 224. n.

(b) Ante 224.

It was replied by ſerjeant *Eyre*, amongſt other things, that there ought to be an intire and permanent conformity of a papiſt, in order to be intitled to the whole eſtate of his anceſtor by deſcent. And he ſaid, that if a perſon conforms himſelf to the church

church of *England* to the time of his death, and then in his laſt moments, perhaps through the artifice of a prieſt, makes a recantation, this is not ſufficient proof of his relapſe, in order to ſet aſide his will.

Lee C. J. The proviſo that hath been mentioned is a full anſwer to the new objection; a conformity of the perſon, and a certificate and inrolment, being the only terms thereby required to take papiſts out of the diſability created by the enacting clauſe: And the court cannot require more than what the ſtatute mentions. There might have been a ſincere mind in the perſon at the time of his conformity; and when he relapſes, he is only ſubject to the diſability of diſpoſing of his eſtate. There is no *foundation for the objections on the bill of exceptions. The queſtion is, whether parol evidence may be admitted to prove a man to be a papiſt. Now it is impoſſible to have better; for even a conviction muſt be founded on that: But whether it be ſatisfactory to a jury, is another queſtion, and not now under conſideration. As to the contrariety objected, there is none in the evidence, though there is in the ſentiments and behaviour of the teſtator, but it is only an account of his different way of thinking and acting at different times. * P 238

The reſt of the court were of the ſame opinion *in omnibus*; and therefore the judgment was now affirmed.

The

S. C. 2 Strs. 1092.

The King againſt *Wykes and others.*

Information granted againſt a juſtice of peace becauſe he alone took an examination in order to make an order of removal, and upon a complaint not ſtating that the perſon to be removed was likely to become chargeable. Alſo againſt two other juſtices for ſigning the order without examination, and without ſummoning the party and demanding ſecurity. Vide Cald. 181. Stat. 13, 14 Car. 2. c. 12.

AN information was prayed by Sir *Thomas Abney* againſt one *Wykes*, a juſtice of peace, for ſeveral matters of miſdemeanor; the principal of which was, that he alone took an examination in order to make out an order of removal: And an information was alſo deſired againſt two other juſtices, for ſigning the ſaid order upon *Wykes*'s ſole examination, and without ſummoning the party, and demanding ſecurity. And this motion was made at the inſtance of the party ordered to be removed, who now ſwore, that he was a ſubſtantial perſon. And *Abney* cited *The King* and *the inhabitants of Holton*, (*Hil.* 5 *G.* 1.) where it was objected to an order of removal, that the examination was by one juſtice only: and it was held, that the examination muſt be by two juſtices, and by the ſame who make the order, according to *Salk.* 488. which is in point.

On the other ſide an affidavit was produced, that the complaint before *Wykes* was, that the perſon to be removed had endeavoured to gain a ſettlement in the pariſh "contrary to law;" but without ſaying, * P 239 that he was likely *to become chargeable: And it was not now denied that he was a ſubſtantial perſon. And the reaſon given for *Wykes*'s not ſigning the order was, that he is a pariſhioner of the place from whence the party was ordered to be removed. And

S. P. Bur. S. C. 194. but 16 *Geo.* 2. *c.* 18 has removed the objection.

ſolicitor

ſolicitor general *Strange* cited *The King* and *Weſtwood*, *(a) Hil.* 4 *G.* 1. Where (he ſaid) it was determined, upon conſideration of the caſe in *Salk.* that an examination by one juſtice, upon making an order of removal, is ſufficient: And ſo the practice hath always been. (a) Stra. 73.

But the whole court were now clearly of opinion, that in caſes of removal there ought to be a joint examination, and this too by the ſame juſtices who ſign the order, it being an act of judgment. *Rex* v. *Coln.* Bur. S. C. 136.

And, by their unanimous conſent, an information was granted againſt *Wykes*; and this principally, becauſe it was not ſaid in the complaint, that the party was likely to become chargeable; which is the very point that gives the juſtices a juriſdiction; and many orders (they ſaid) have been quaſhed, becauſe theſe words were omitted: Though Mr. ſolicitor objected, that the words here, that the party endeavoured to gain a ſettlement "contrary to law," involve that circumſtance. v. Bur. S. C. 43. 138. 165. 2 Salk. 485 491. 6 Mod. 163. Stra. 77. poſt 361.

An information was alſo granted againſt the two other juſtices (*Lee* C. J. *diſſentiente*) for returning a falſity, and ſo endeavouring to impoſe upon the court, the order reciting, that a complaint hath been made, and the party examined, before us upon oath, *&c.* which is not true: And alſo for not ſummoning the party. But the chief juſtice was againſt granting the information againſt theſe two juſtices, becauſe their acting ſeems to ariſe from a miſtake only, *viz.* that they might grant a warrant of removal upon an examination before another juſtice. And as to their not demanding ſecurity, he ſaid, they were not obliged to do this; but the party ſhould have offered it. To which it was anſwered by the reſt of the court, that they did not ſummon him, to give him an opportunity of offering it.

The

*P 240 *The King* againſt *Blaney*.

Conviction founded on the evidence of the informer only, quaſhed Ante 18. *Rex* v. *Percy*. S. P.

MOTION by Mr. *Willes* to quaſh a conviction upon the ſtatute of 5 *A. c.* 14. *(ſ.* 4.) becauſe (1) This is a conviction for two diſtinct offences, *viz.* for hunting with ſetting-dogs and nets, and alſo for having the goods in the defendant's houſe; whereas both theſe things conſtitute but one offence, and for which there is but one forfeiture. The intent of the legiſlature was, to puniſh every perſon who ſhall kill game that is unqualified; and the having dogs, &c. in the houſe is only conſidered as evidence of the killing game, as it may be difficult to find perſons actually committing the fact. And the words of the act, "keep or uſe," ought to be conſtrued in this manner; that if a perſon keeps dogs, &c. though it be not or cannot be proved that he uſes them, he ſhall be puniſhed; and ſo *vice verſa*; but the meaning is not, that if he does both, he ſhall be puniſhed for each; which would be puniſhing him twice for the ſame offence. (2) Suppoſing that theſe are two diſtinct offences, and puniſhable ſeverally, there ought to have been two diſtinct convictions, all one as there muſt be two indictments for two diſtinct crimes. (3) It ought to be alledged, but it is not, that the facts were committed againſt the form of the ſtatute. In an indictment for perjury

v. *Rex* v. *Salomons* 1 Term Rep. B. R. 249.

jury where this is not averred, the party is punishable at common law only: And this case is stronger than that, because here the justices have no authority by the common law; and nothing can be intended to give a jurisdiction. (4) No forfeiture is imposed by this conviction, and consequently it is incompleat, and all one as a verdict without judgment. And in *The King* and *Buells*, *(a)* (*Hil.* 3 G. 2.) a conviction for deer-stealing was held ill, for this very fault. *(5)* This conviction appears to be founded only on the evidence of the informer.

(a) V. *Rex* v. *Howels.* 2 Stra. 858. Fitz G. 124. S. P.

*And this last exception was admitted by Mr. *Yeates* (who was the prosecutor's counsel) to be fatal: And he said, that though in 3 *Mod.* 114. it is disallowed it is now otherwise. * P 241

Upon this objection therefore, (without giving any opinion in relation to the others) the court quashed the conviction.

S. P. *Regina* v. *Cobbold* Gilb. Rep. B. R. 111. on the same statute.

The King against *Castle.*

S. C. Ante 119. 2 Stra. 1097.

THIS case was now stirred again: And solicitor general *Strange*, in behalf of the crown, insisted principally on the objection, that the swearing in of the defendant doth not appear to have been before a majority of the free burgesses, which is expresly required by the charter. For the words of the verdict are, "*in præsentia quam plurimorum liberorum* "*burgensium*;" and as appears by *Cole*'s, and other dictionaries, *quam plurimus* signifies only a great many;

many; which may not perhaps be the major part: And in *Tully* there is this expreſſion, "*quam plurimas* "*egit gratias*;" which ſignifies, that he gave many thanks. Beſides, in this caſe the election is before ſet out to be "*per majorem numerum*;" ſo that the other words ſeem oppoſed to the majority, and mean ſomething leſs. And, he ſaid, it hath been determined in the houſe of lords, that a good ſwearing in is neceſſary to be found in theſe caſes.

On the other ſide it was argued by ſerjeant *Parker*, that *plurimus* is a ſuperlative, and when the conjunction [*quam*] is added to a ſuperlative, it makes the expreſſion as forcible as poſſible; and therefore [*quam plurimus*] ſignifies "as many as may be;" and when applied to a certain number, (which is the preſent caſe, the burgeſſes appearing to be twenty) it means a majority. *Littleton's Dict.* tit. **quam.* And as it is here uſed by lay-gents, it ought not to receive a ſtrict conſtruction.

* P 242

But the whole court were clearly of opinion, that the word [*quam plurimus*] ſignifies very many, or a very great many, and it cannot be found (as *Probyn* juſt. ſaid) in any of the claſſics, to mean more; and it doth not neceſſarily ſignify the greater part of any certain number; as (for inſtance) of a million: And the caſe is the ſame whatever the number be. And (*Lee* C. J. ſaid) if it ſignifies "as many as may be," (as is contended for) this will not help the caſe, for that may only mean as many as could conveniently come. And, he ſaid, there muſt be a title found for the defendant in ſuch terms as are plain and certain: And therefore as the words here do not neceſſarily carry a majority, it is not ſufficient.

Judgment for the crown.

Smalley

Smalley againſt *Kerfoot and his wife and two others.* S.C. 2 Stra. 1094.

In *Treſpaſs*, plaintiff declares againſt huſband and wife, for entering his houſe, taking his goods and *converting them to their proper uſes*; this held to be good; for the converſion is not the giſt of the action, and as the wife could not be guilty of it to her own uſe, it is to be intended that no damages were given for it.

IN treſpaſs the plaintiff declares againſt huſband and wife and two others, for entering into his houſe, and taking his goods, and converting them to their proper uſes: And the defendants ſuffered judgment by default; whereupon a writ of inquiry was executed, and the jury gave five pounds damages.

And it was moved laſt *Michaelmas* term in arreſt of judgment by Mr. *Field*, that this declaration is ill, becauſe it alledges the converſion to be to the uſe of the wife, which is impoſſible. And this point was then argued by him in behalf of the defendants, and by Mr. *Ketelby* for the plaintiff: And the court deſiring a further argument, and by other counſel, (as is uſual in caſes of difficulty) it *was again argued this term by Mr. *Deniſon* for the defendants, and by ſerjeant *Parker* for the plaintiff.

On the ſide of the defendants it was argued, that though in the caſe of a battery, or other perſonal wrong, committed by baron and feme, the wife is liable to an action as well as the huſband, and ſhe may be ſued after his death; yet it is a ſettled point, that an action of trover is not maintainable againſt huſband and wife for a converſion to their uſe: The reaſons whereof are, that in ſuch caſe, though the wife be preſent and conſenting to the converſion, yet in judgment of law it is conſidered as the ſole act of the

* P 243

the huſband; and the property of the goods belongs not to her, but to the huſband, and will go to his repreſentative; and yet if judgment ſhould be given againſt both, and the wife ſhould ſurvive, ſhe would be obliged to make ſatisfaction. *Cro. Jac.* 661. S. C. *Palm.* 343. *Cro. Car.* 254, 494. 1 *Vent.* 12, 24, 33. 2 *Keb.* 476. Now an action of treſpaſs, where damages are given not only for the taking the goods, but for the value thereof, (which is the preſent caſe) doth not differ from an action of trover. *Salk* 114. (the *N. B.* there.) In treſpaſs the wife is chargeable with the value of the goods if the huſband dies; and yet the goods will go to his repreſentative, for the treſpaſs alters the property; ſo that both caſes would be attended with the ſame miſchief. And a recovery in treſpaſs for entering, and taking and converting goods, is a good bar in trover, both being actions of the ſame nature. 6 *Co.* 7. *a. Cro. El.* 667. 2 *Vent.* 169. S. C. 1 *Show.* 146. Otherwiſe it is where the damages are given not for the goods, but for the taking thereof only; and ſo is *Cro. Car.* 35. But there it ſeems to be admitted, that if damages had been given for both, it would have been a good bar. And here the five pounds given for damages cannot be ſuppoſed to be given for the taking only. Beſides, in an action of treſpaſs the converſion is traverſable: And if it be not, this would be no anſwer to the preſent objection, which is, that damages are here given, where by law they ought not. In-
* P 244 deed where an *action is brought for ſeveral treſpaſſes, each of which is actionable, and yet ſome of them are of that nature that the plaintiff hath no right to recover any thing thereon in that action, he ſhall notwithſtanding have judgment: An inſtance whereof is in 2 *Salk.* 642. But this caſe is materially different,

ferent, becauſe here the matter of aggravation is ſuch, that no action lies againſt the wife for it. This is therefore like the caſe of an action brought againſt huſband and wife for words ſpoken by them both; which is plainly not maintainable, the wife not being anſwerable for the words of her huſband. *Style* 349. S. C. 1 *Roll.* 781. So if an action of treſpaſs and falſe impriſonment is brought, and the impriſonment is brought down in the declaration to a time ſubſequent to the commencement of the action; though this be by way of aggravation of damages, yet it will vitiate the verdict. Upon the whole therefore, as all the defendants are found guilty of the whole matter contained in the declaration, one of whom is not liable, and the damages are given thereupon againſt all, the plaintiff ought not to have judgment upon this verdict.

It was argued on the other ſide, that there is a material difference between an action of trover and of treſpaſs; for in the former, the converſion is the giſt of the action; but in the other, it is laid only by way of aggravation of damages: And therefore in ſuch caſe it is ſurpluſage, and immaterial. 2 *Lutw.* 1393, 1524. 1 *Salk.* 119. 2 *Salk.* 642. 2 *Vent.* 45. *Morefoot* and *Chivers and his wife, (a) Trin.* 11 *G.* 1. in *K. B.* That was a *ſcire fieri* inquiry, to which there was a demurrer, and judgment in *C. B.* for the plaintiff. And a writ of error being brought in this court, it was objected that the *ſcire fieri* was ill, becauſe it charged, that the huſband and wife had waſted the goods of the teſtator, and converted them to their own uſe. But the court held this to be well enough, becauſe the wife might have waſted the goods and the converſion is immaterial. And afterwards the judgment was affirmed in the houſe of lords.

(a) 2 Lord Raym. 1395. Stra. 631.

(b) 2 Stra. 1015. not S. P. V. Bull. N. P. 53.

lords. *Bourne & ux'* and *Mattaire*, (b) *Eaſter* *8 G. 2. in *K. B.* Replevin by huſband and wife for taking the goods of the huſband and wife *ad damnum ipſorum*; and upon a motion in arreſt of judgment, this was held to be good: And the court there cited 1 *Vent.* 260, 261. Objected, That the wife may be injured, by reaſon of the words in this declaration. Anſwer: It would have been the ſame thing if the words objected to had been omitted; for in ſuch caſe damages would be given for the value of the goods, by which the wife would be equally charged as ſhe is now. It is alſo to be obſerved, that there are four defendants in this caſe; ſo that there is no neceſſity of making the word [their] include the wife. [But *Lee* C. J. ſaid, that it muſt be applied to, and takes in, all the defendants.] And as to the *N. B.* in *Salk.* 114. cited *contra*, (it was ſaid) this is not to be found in the firſt edition of that book.

* P 245

The caſe was adjourned for conſideration; and this term *Lee* C. J. delivered the reſolution of the court to the following effect:

It muſt be agreed, that in an action of trover againſt huſband and wife, if it be alledged that they converted to their own uſe, it is not good; and though there is ſome difference in the books upon this point, it is now ſettled in the caſe in 1 *Salk.* 114. But the preſent queſtion is, whether ſuch an allegation is ill in an action of treſpaſs. And we are all of opinion, that in ſuch an action it is well enough; for that it is not the giſt thereof. The entry and the taking is a ſufficient cauſe of action; and therefore in the preſent caſe, the converſion being a matter which in law the wife cannot be guilty of to her own uſe, it is not to be conſidered as a matter for which the damages are given. The caſes in 10 *Co.* 130. *b.*

and

and *Cro. Jac.* 665. are ſtrong for this purpoſe; and ſo is the caſe of *Ruſſel and his wife* againſt *Corne*, (c) reported in *Salk.* 119. That was (as I have it from a manuſcript report) an action of treſpaſs, aſſault and battery by huſband and wife; and in the declaration there were ſeveral counts for beating the wife, and in one *of them it was ſaid, "*per quod negotia domeſtica* of the huſband *infecta remanſerunt*; and it was laid to be *ad damnum ipſorum*; and intire damages were given. And it was moved by Mr. *Mountague* in arreſt of judgment, that the wife cannot join with her huſband in an action where the giſt of it is the loſs of the huſband's buſineſs. *Holt* C. J. ſaid, that if the allegation had been *per quod conſortium ſuum amiſit*, the wife could not have joined. And by Mr. juſtice *Powell*, it is not to be intended that any damages were given for the ſpecial matter: And it was there laid down, that where the action is maintainable without the matter contained under the *per quod*, this ſpecial matter is to be conſidered as being by way of aggravation only. Afterwards the caſe came on again; and the declaration was held to be well enough. I remember that afterwards lord chief juſtice *Parker* had ſome difficulty about that caſe, and Mr. juſtice *Eyre* then cited *Rodd* and *Radford*, (d) *Mich.* 8 *Ann.* which (he ſaid) was determined on the ſame foundation. That there is a difference between trover and treſpaſs, appears by 2 *Vent.* 45. and *Bellew* and *Scott*, (e) (which was argued *Hil.* 1 *G.* 1. and determined ſoon afterwards) agrees therewith. This caſe hath been compared at the bar to an action of aſſault, battery and falſe impriſonment, where the impriſonment is continued to a time ſubſequent to the bringing of the action; and this, it hath been ſaid, will be naught on a general verdict: And ſo indeed

(c) 6 Mod. 127. 2 Lord. Raym. 1031.

* P 246

(d) 11 Mod. 264.

(e) Stra. 440.

it

(f) 1 Lord Raym. 329. See poſt. 250.

it was determined in *Braſsfield* and *Lee*, (f) *Paſ.* 10 *W.* 3. in *K. B.* That was an action of treſpaſs, and battery and falſe impriſonment; and the battery and impriſonment were mentioned to be for four months: And this was held to be ill, upon a general verdict. And *Carth.* 95. agrees therewith. But theſe caſes do not affect the preſent, becauſe in thoſe the continuance of the impriſonment is a very material thing as to the damages, but in this (as appears by the authorities before mentioned) the converſion is immaterial; and conſequently the declaration *is good, * P 247 though the converſion is laid to be by huſband and wife to their own uſe. Judgment for the plaintiff.

Beer againſt *Alleyn.*

Declaration againſt an attorney concluding "*and therefore brings ſuit*" inſtead of "*ſeeks relief*" held good on ſpecial demurrer.

ACTION on the caſe againſt an attorney for goods ſold and delivered; and the defendant demurs ſpecially to the declaration, becauſe it is not well concluded, the words being, "and therefore "bring ſuit;" whereas it ought to be, "*& pet*' "*remedium.*"

And it was urged by Mr. *Deniſon* for the plaintiff, that this declaration is agreeable to all the precedents in this court, though it is otherwiſe in the Common Pleas.†

And no one appearing for the defendant, judgment was given for the plaintiff.

† See Barnes. 3. 11. 167.

Ord,

Ord, on the demiſe of Dr. Lynch, truſtee for the dean and chapter of Canterbury, againſt *Stubbs.*

Leſſee of Dean and Chapter, being defendant in ejectment brought by their truſtee ſhall not have liberty to inſpect their books.

MOTION by Mr. *Deniſon*, that the defendant in ejectment, who is a leſſee under the dean and chapter of *Canterbury*, or their truſtee, and whoſe leaſe is renewable every ſeven years, may have the liberty of inſpecting the books of the ſaid dean and chapter. And he compared it to the caſe of a copy-holder, who hath a right to ſee the books and rolls of the manor (*a*): And he cited *Underhill* and ——— (*b*) (which was mentioned in the caſe of *Crew* and *Blackbourne*†) where a motion was made by a *leſſee to inſpect the public books of the dean and chapter of *Durham*; and it was refuſed for this reaſon only, that there the dean and chapter were not parties.

But in this caſe the court denied the motion, becauſe theſe books are of a private right, and contain the plaintiff's evidence. And the court ſaid, that this is not like the caſe of a lord and his copy-holder, for there the lord is in the nature of a truſtee, and is the common repoſitory of the writings of

(*a*) *Barnes.* 236. 237. 238. 1 Term Rep. B. R. 141.

* P 248

(*b*) Trin. 11 W. 3.—*Qu.* Whether this be not the caſe of *Underhill* v. *Durham*, 1 Salk. 256. Holt. 264. 1 Freem. 509. Colles's P. C. 338.

† *Crew* and *Blackbourne*, *Hil.* 8 *G.* 2. in *K. B.* Action againſt the defendant as deputy of a poſt maſter, for meddling in an election, on the ſtatute of 9 *A. c.* 10. And it was prayed, that the plaintiff may inſpect the books of the poſt-office, where the deputations are entred, in order to ſee in what ſtation the defendant is employed: But by *Hardwicke* C. J. and the other judges, the motion was denied. (A) A ſimilar caſe is reported, 2 Str. 1005, by the name of *Crew* v. *Saunders*.

the manor. And *Lee* C. J. remembred a caſe, but not the name of it, where an inſpection of the ſame kind with the preſent was refuſed.

Upon the ſubject of inſpecting Books, &c. See *Comyn's. Dig.* Tit. *Evidence* (C)—1 Term Rep. B. R. 689.—3 Term Rep. B. R. 141. 303.

Phillips againſt *Phillips.*

Stat. 2 *Geo.* 2. c. 24. againſt bribery in election of members of parliament, is not confined to candidates and perſons employed by them.

ERROR of a judgment in *C. B.* in an action brought on the ſtatute of 2 *G.* 2. *c.* 24. for preventing bribery and corruption in the election of members of parliament, in which there was a verdict for the plaintiff.

In C. B. the *Placita* are entered of the term generally, tho' the original be returnable in the midſt of the term.

And it was aſſigned for error by ſerjeant *Parker*, (1) That it doth not appear upon this declaration the defendant was a candidate, or a perſon employed by one; and the act (which being penal, muſt not be carried beyond the letter) doth not extend to any others. (2) The original was not returnable when the action was commenced; for it is returnable on the ſecond return of *Michaelmas* term, and the *placita* are entred generally of the ſame term, which muſt refer to the firſt day thereof: So that this original can be no warrant to theſe proceedings, but it is properly an original of ſome other cauſe. Now though this be after a verdict, yet an original is abſolutely neceſſary, becauſe without it the court of Common Pleas hath no juriſdiction: And there could be no ſuit pending until the writ was returnable. [And

Objection that the jury were not ſummoned on the *Venire*, nor attached on the *Diſtringas* overruled, for there can be but one general return ſince the balloting act; and the want of a return is cured by the appearance of, and trial by a proper jury.

ſerjeant

ſerjeant *Parker* ſaid, he was informed that there are ſpecial *placita* in the Common Pleas.] (3) The *venire facias* and *habeas* **corpora* are not well returned; for on the *venire* the jury do not appear to have been ſummoned; and it does not appear on the other writ that they were attached by pledges. * P 249

On the other ſide it was argued by Mr. *Deniſon*, and unanimouſly reſolved by the court, (1) That the act upon which this action is brought, is not confined only to candidates and perſons employed by them, but it extends to all perſons whatſoever; the words being as plain and as general as poſſible. (2) This being an action brought in the Common Pleas, (in which *Chapple* juſt. ſaid, there are no ſpecial *placita*) the original is well enough. For (as *Lee* C. J. argued) the whole term may be conſidered as one intire day. And as *Chapple* juſt. ſaid, the entry of the *placita* extends to and takes in all pleas inrolled in any and every part of the term. But, he ſaid, in this court where a debt accrues in term-time, and in the ſame term the party comes and complains, he muſt have a ſpecial memorandum, in order to ſhew that the cauſe of action precedes the bringing of the action. Beſides, the 5 *G.* 1. *c.* 13. (which hath been called an omnipotent act) extends to this caſe: For it cures all defects in ſubſtance as well as form; and in the proviſo penal actions are not excepted, as is done in the other ſtatutes of jeofails. (3) As to the return, there can be no other than one general return ſince the balloting act. And beſides, the want of a return is cured by the appearance of and a trial by a proper jury. Stat. 3 G. 2. c. 25.

The court were therefore ſtrongly inclined to affirm the judgment: But counſel being retained to argue the caſe again, it was affirmed *niſi*, &c.

S.C. 2 Stra. 1095.
* P 250

*Webb against *Turner.*

Treſpaſs for beating, wounding and impriſoning the plaintiff for a long time, *Scil* for 25 weeks then next following; which extended beyond the time of bringing the action, after verdict and intire damages, the Court refuſed to arreſt the judgment.

IN treſpaſs (by bill filed *Michaelmas* term 11 *G.* 2.) the plaintiff declares, that the defendant 17 *May* 10 *G.* 2. with force and arms at, *&c.* aſſaulted the plaintiff, and then and there beat, wounded and impriſoned him for a long time, *ſcilicet*, for twenty-five weeks then next following: And there is another count in the declaration, that defendant 18 *October* 11 *G.* 2. *&c.* aſſaulted the plaintiff, and then and there beat, wounded, and impriſoned and detained him for a long time, *ſcilicet*, for other twenty-five weeks, *&c.* And a verdict having been obtained by the plaintiff, in which intire damages were given, it was moved laſt term by Sir *Thomas Abney*, in arreſt of judgment, that the time of the defendant's impriſonment, as mentioned in both counts, extends far beyond the time of bringing the action, and intire damages are here given, which is certainly wrong.

And it was now argued by Sir *Thomas Abney*, Mr. *Marſh*, and others, in ſupport of the motion, that though generally what is laid under a *ſcilicet* is not material, but is only by way of aggravation of damages, yet here it is a ſubſtantial part of the charge, and the jury were obliged to give damages *ſecundum allegationem* of the plaintiff. As therefore in perſonal actions the plaintiff cannot recover any damages incurred pending the ſuit, this declaration is erroneous. *Hob.* 189. *Cro. Jac.* 618. *pl.* 8. 2 *Saund.* 169. 1 *Vent.* 103. *Carth.* 386. 2 *Salk.* 662. S. C. 5 *Mod.*

Mod. 286. As to the caſe in *Hob.* 284. (which ſeems to the contrary) there the proceeding being by original, and many actions are brought in *C. B.* without any original, 3 *Lev.* 246.) the teſte did not appear upon the record, which is the true reaſon of the judgment. Beſides, the reaſon mentioned in the book (that the *viz.* is unneceſſary) does not hold good in the preſent caſe; for here the time is a *material * P 251
part of the declaration, without which it would be ill, on demurrer, for incertainty: And it is not to be ſuppoſed the jury rejected it, they being lay-gents, and not conuſant of its being immaterial in caſe it be ſo.

On the other ſide it was argued by ſolicitor general *Strange* and others, (1) That the preſent objection is not warranted by or ariſes from the record. For it being laid in the declaration, that on ſuch a day the defendant aſſaulted, and then and there beat, wounded and impriſoned the plaintiff for a long time, *ſcilicet*, &c. the day firſt mentioned extends only to the aſſault, and not to the impriſonment; which might have been before; *ſed non allocatur.* For, as *Lee* C. J. ſaid, this clauſe muſt be taken as one intire ſentence containing the whole charge; and the impriſonment neceſſarily refers to the ſame time when the aſſault was made. (2) It was anſwered, that the continuance of the impriſonment is only by way of aggravation of damages, and is not ſo material a part that the jury muſt neceſſarily be ſuppoſed to have given any damages by reaſon thereof; the impriſonment itſelf being the cauſe of action, and ſufficient to warrant the jury, though it was for ever ſo ſhort a time, in giving damages. Beſides, what is contained under the *ſcilicet*, (which, according to *Hob.* 171, 172. is only *clauſula ancillaris*) is impoſſible,

ble, and contradictory to what is well laid; for it is alledged, that defendant then impriſoned, &c. and therefore it ought to be wholly rejected. On this ſide were cited *Hob.* 189, 284. *Alleyn* 22. *Hardr.* 4. *Salk.* 622. S. C. 5 *Mod.* 286. And as to the caſes cited *contra*, it was ſaid, that in them either there is no *ſcilicet*, or elſe what comes under it is the giſt of the action: And therefore they materially differ from the preſent. And in *Salk.* 662. no cauſe of action appears.

For theſe reaſons and upon theſe authorities, particularly that in *Hob.* 284. (which they ſaid was in point) the court were unanimouſly of opinion, that this declaration is well enough; and the damages
*P 252 muſt be taken to be *given only for what is well laid.
Ante, 246. But *Page* and *Probyn* juſt. inclined to think, that it would be otherwiſe if it had been expreſly averred that the defendant had impriſoned the plaintiff for ſo many weeks; this being one intire charge, and therefore the whole muſt be proved. And *Probyn* juſt. alſo ſaid, that if a plaintiff declares the defendant impriſoned him *per longum ſpatium temporis*, or without theſe words, this is no ſufficient cauſe of demurrer, becauſe the impriſonment itſelf is the cauſe of the action. And the whole court were of opinion, that however this might be on a ſpecial demurrer, it would be very well after a verdict.

Motion therefore denied; and the *poſtea* was ordered to be delivered to the plaintiff.

V. *Yalden* v. *Hubbard*. Comyn's Rep. 231.

Hammond

Hammond againſt *Gatliffe.*

An Executor *de ſon tort* of an executor *de ſon tort*, is not liable for the debts of the firſt deceaſed. *Semb.*

AN action was brought againſt *Mary Gatliffe* as executrix of *Avarina Gatliffe*, who was executrix of her huſband *Charles Gatliffe*, for a debt due from *Charles* to the plaintiff. Defendant pleads (by leave of the court, under the late ſtatute) two matters, *viz.* that *Avarina G.* was not executrix of *Charles G.* and alſo that ſhe (the defendant) was never executrix of *Avarina*. And upon the trial of the cauſe at the aſſiſes before the lord chief baron *Reynolds*, a verdict was found for the plaintiff, ſubject to the opinion of the judge of aſſiſe, upon a caſe ſtated by the conſent of both parties; and afterwards it was by him remitted to the judgment of this court. The caſe was briefly this:

After the death of *Charles Gatliffe*, *Avarina* his wife took his goods and ſold them, and died: And ſeveral of the goods of *Avarina* came to the hands of the preſent defendant. And the ſingle queſtion hereupon was, whether an executor *de ſon tort* of an executor *de ſon tort* is liable to pay the debts of the firſt deceaſed.

*And it was now argued by ſerjeant *Wynne* for the plaintiff, that an executor *de ſon tort* is liable to payment of the debts of the deceaſed, by reaſon of the poſſeſſion of his goods, which is notice to the creditors whom they muſt ſue: For otherwiſe where there is no lawful executor or adminiſtrator, the creditors

* P 253

ditors will be without remedy. *Dy.* 166. *b.* *Went. office of executors, c.* 14. *Stat. of* 43 *El. c.* 8. The executor of an executor was not indeed chargeable on a *devaſtavit* by the firſt executor, before the ſtatute of 30 *Car.* 2. *c.* 7. becauſe it was conſidered as a perſonal tort. 2 *Lev.* 110. But the executor of an executor *de ſon tort* was in ſuch caſe liable. 2 *Lev.* 133. Now if it be ſo in the caſe of a rightful executor, *a fortiori* it muſt be ſo in the caſe of an executor of his own wrong: And this is agreeable to reaſon, a *devaſtavit* being not a mere perſonal wrong, as an aſſault and battery, (which is an injury to the perſon) but a wrong to the eſtate of the deceaſed, and a fraud with reſpect to creditors. 1 *Lutw.* 673. However, the preſent caſe is within the ſtatute of 30 *Car.* 2. the words of which are very general; and it is alſo within the reaſon of it. 3 *Mod.* 113. So the act of *Eliz.* relating to apprentices, extends not only to thoſe who are actually bound apprentices, but a ſervice alone, *tanquam* an apprentice, is ſufficient within that act.

On the other ſide it was argued by Mr. *Lacey*, that though at common law an executor *de ſon tort* is chargeable in reſpect of the poſſeſſion, and creditors may recover againſt him whilſt living, yet when he dies, his executor *de ſon tort* is not chargeable. 3 *Leon.* 241. 1 *Roll.* 920. 2 *Mod.* 293. 2 *Lev.* 110. S. C. 1 *Vent.* 292. 2 *Ch. Ca.* 217. And as to the ſtatute of *Car.* 2. (by which it appears, that at common law no action lay againſt the executors of executors of their own wrong) as this act mentions executors generally, it muſt be underſtood of ſuch only as are rightful; for an executor *de ſon tort* is not properly an executor, but a tort-feaſor. This alſo appears by the words, "as their teſtator or inteſtate;"

tate;" *whereas a wrongful executor hath no teſta- * P 254
tor or inteſtate. And as for the words, "all and "every the executors, &c." the reaſon of inſerting theſe may be, to include the caſes where there are ſeveral executors, and one or more of them renounces the executorſhip, or dies before probate. Beſides, it is plain by the 4. 5 *W.* 3. *c.* 24. *ſ.* 12. that every caſe of this kind was not provided for by the act of *Car.* 2. And by the ſtatute of 2 *G.* 2. *c.* 22. *ſ.* 11. (which mentions executors generally) an executor *de ſon tort* is not enabled to ſet off debts.

And the court were ſtrongly inclined to this opinion on both points, *viz.* that an executor *de ſon tort* of an executor *de ſon tort* is not liable at common law for a *devaſtavit* committed by the firſt: And that ſuch an executor is not within the ſtatute of *Car.* 2. becauſe (as *Probyn* juſt. ſaid) in the firſt part of the act executors *de ſon tort* are not named, though afterwards they are expreſly mentioned.

And it was objected by *Lee* C. J. that it does not appear by the caſe that *Avarina* was guilty of a converſion; upon which point alone it is that any queſtion can ariſe upon the ſtatute: For it is ſtated only, that ſhe took the goods of *Charles*, and ſold them, without ſaying, that ſhe converted them to her own uſe; ſo that, for aught appears ſhe might rightly apply the money ariſing by ſuch ſale. Neither doth it appear that the defendant hath any goods of *Charles*; and if not, ſhe cannot be chargeable.

The caſe therefore being imperfectly ſtated, and the court inclined upon the merits for the defendant, the *poſtea* was ordered to be delivered to her accordingly.

The

charge as it is laid in the information; the legality of which it is the part not of the defendant, but of the court to judge of: And if it be not in itſelf ſufficient, the confeſſion will not enlarge it.

And the whole court were clearly of opinion, that this conviction is not good. For (as they argued) if the ſtatute of 5 *A.* is to be conſtrued in ſo extenſive a manner as to extend to the bare having of any inſtrument that may poſſibly be uſed in deſtroying game, it will be attended with very great inconvenience, there being ſcarce any, though ever ſo uſeful, but what may be applied to that purpoſe. And though a gun may be uſed in deſtroying game, (and when it is, it then falls within the words of the act) yet as it is an inſtrument proper, and frequently *neceſſary to be kept and uſed for other purpoſes, as the killing of noxious vermin, or the like; it is not the having a gun, without applying it in the deſtruction of game, that is prohibited by the act. The words therefore, "or other engine," (as *Lee* C. J. ſaid) muſt be underſtood of ſuch inſtruments as are applicable only to the deſtruction of game, as hare-pipes, &c. or of ſuch as are actually employed in that way. And *Chapple* juſt. ſaid, that if ſuch things as are enumerated in the ſtatute, and are peculiarly fitted or diſpoſed for killing game, as hare-pipes, lurchers, &c. are kept by an unqualified perſon, yet it muſt be averred that they are kept to kill game, which in the preſent caſe would have been ſufficient; and in that caſe it would be incumbent on the perſon having ſuch things in his cuſtody to prove that he kept them for other purpoſes: And ſuppoſing this to be the fact, and that he never uſed them in killing game, he would not be puniſhable. And *Page* juſt. ſaid, he remembered a caſe in lord *Holt*'s time, where it was held, that the keeping a lurcher, without uſing

*P 257

it

it in killing game, was not within the ſtatute of *Car.* 2. though it be expreſly named therein. Beſides, as theſe acts reſtrain the liberty which was allowed by the common law, and are alſo penal, they ought not to be extended further than they muſt neceſſarily be. And *Probyn* juſt. ſaid, that as the legiſlature had the act of *Car.* 2. before them when this was made, they would probably have mentioned guns expreſly, if they had intended to prohibit the having them in a perſon's cuſtody: And therefore it is not without deſign that the word is omitted.

The conviction was therefore quaſhed.

Note; After the court had delivered their opinion, Mr. ſolicitor ſaid, that in the caſe cited of *The King* and *King*, lord *Macclesfield* ſaid, that he was in the houſe of commons when the act of 5 *A.* was made, and he himſelf objected to the inſerting of the word (gun) therein, becauſe it might be attended with great inconvenience.

S. P. *Wingfield* v. *Stratford*. Say. 15. 1 Wilſ. 315. See *Avery* v. *Hoole*, Cowp. 825. *Rex*. v. *Thompſon*, 2 Term Rep. B. R. 18. *Rex*. v. *Hartley*. Cald. 175.

Dr.

*P 258 *Dr. *Martyn* againſt *the archbiſhop of Canterbury.*

Prohibition refuſed, to an appeal to the Arch-Biſhop of *Canterbury* as viſitor of *Merton-college, Oxford,* upon a ſuggeſtion that the Biſhop of *Wincheſter* was the viſitor; the Archbiſhop of *C.* and none other having always exerciſed the viſitatorial power. An appellant may move for a prohibition to his own appeal.

MOTION by ſolicitor general *Strange* for a prohibition to an appeal made to the archbiſhop of *Canterbury*, as viſitor of *Merton-college* in *Oxford*, by Dr. *Martyn*, one of the fellows thereof, from a complaint againſt him by the ſaid college. And this prohibition was prayed at the inſtance of Dr. *Martyn* himſelf, (which it was urged might be done) and he ſuggeſted ſeveral charters and ſtatutes of the college, whereby (as it was urged) it appears that the biſhop of *Wincheſter* is viſitor of the college, he being called in the original ſtatute, and ſeveral others, "*ſpecialis protector, pater, & defenſor, &c.*" of the college.

On the other ſide ſeveral records from the archbiſhop's regiſtry at *Lambeth* were produced, whereby it appears, that from the year 1284. (which was about ſix years after the death of *Walter de Merton* the founder) to the preſent time, the archbiſhops of *C.* have exerciſed a viſitatorial power over this college: And in all the charters they are called "*patronus & pater, &c.*" And it was ſaid, that the reaſon of the appellation given to the biſhops of *Wincheſter* of "*ſpecialis protector, &c.*" is, that the college was founded at *Maudlin* in the county of *Surry*, formerly within the dioceſe of *Wincheſter*, and afterwards removed to the dioceſe of *Oxon*; and the charter was confirmed by the biſhop of *Wincheſter* and the dean and chapter thereof.

It

It was argued in favour of the prohibition by Mr. ſolicitor general, ſerjeant *Parker*, and others, that as there is an acting viſitor on the one ſide, and the right of the other depends on a variety of evidence, the matter ought to be tried. And in the caſe of a viſitor it is a rule, that if there be any doubt, the court will not determine the point of juriſdiction on a motion: And ſo it was laid down by Mr. *Reeve*, * P 259 afterwards chief juſtice of the *Common Pleas, in *The King* and *the biſhop of Ely*, in this court. And Mr. ſolicitor ſaid, that in the caſes of *Univerſity-college* and *Oriel-college*, both of which were of royal foundation, there was much longer uſage of a viſitatorial power than here, and yet the right was found againſt the uſage.

But in the principal caſe the whole court were ſtrongly of opinion, that a prohibition ought not to be granted. For no one beſides the archbiſhops of C. hath exerciſed a viſitatorial power over this college; and there hath been ſo long an uſage, that though this doth not give a right, it is a very ſtrong proof of one. To which point *Lee* C. J. cited 1 *Vent.* 155. Beſides, no one appears now, who claims the viſitatorial power, beſides the archbiſhop; neither the biſhop of *Wincheſter*, nor the heir of the founder, (in which laſt the right muſt be, if none be conſtituted viſitor, as this college is of private foundation) but the preſent motion is only at the inſtance of a ſingle fellow. And therefore the caſes which have been cited differ from this, becauſe in thoſe there were ſeveral claimants, and different rights and ſtatutes; the claim by the biſhop of *Lincoln*, in the caſe of *Oriel-college*, being as *loci ordinarius*. And *Probyn* juſt. ſaid, that if the biſhop of *Wincheſter* had joined in this complaint, there would be

be no reaſon for granting a prohibition, becauſe by the words of the charter, he is at moſt but a ſpecial viſitor.

However the matter was now adjourned, that the court might look into the caſes cited at the bar. And afterwards (this term) C. J. ſaid, they had looked into and conſidered thoſe caſes, but that they retained their former opinion. A prohibition was therefore denied.

Note; Whilſt ſuch parts of the records produced on the archbiſhop's ſide (which were very long) were reading, as his counſel directed, it was inſiſted by ſerjeant *Parker* on the other ſide, that the whole ſhould be read. But the court ordered ſuch parts as
*P 260 the archbiſhop's counſel thought *material to be firſt read. And afterwards ſerjeant *Parker* waived the other point.

The King againſt *Cockerell.*

A new trial granted in *quo warranto*, the jury having found a general verdict for the King, which as to two of the iſſues was againſt evidence.

IN a *quo warranto* brought againſt the defendant for uſurping the office of one of the bailiffs of the corporation of *Scarborough*, the jury found a general verdict upon all the iſſues (which were thirty-ſix) for the King.

And a new trial was now prayed, upon affidavits of miſbehaviour in ſome of the jurors, (but theſe were fully anſwered on the other ſide) and alſo becauſe this is a verdict againſt evidence. And Mr. juſtice

juſtice *Page*, who tried the cauſe, reported, that two of the iſſues are found againſt evidence, *viz.* that the defendant was not a capital burgeſs; and that thirty-four of the perſons preſent at the aſſembly when the defendant pretended to be elected, (which ought to conſiſt of thirty-ſix capital burgeſſes, and eight others) were not capital burgeſſes.

But (on the other ſide) the cuſtom and conſtitution, under which the defendant claimed to be elected, being rightly found againſt him, and alſo that he was not duly elected; and it being not neceſſary for a perſon to be a capital burgeſs, in order to be choſen bailiff, becauſe, according to the conſtitution, if he be either that or a freeman, it is ſufficient; it was argued by ſolicitor general *Strange*, ſerjeant *Eyre*, and Mr. *Deniſon*, againſt the motion; that a new trial ought not to be granted, becauſe the iſſues found againſt evidence are immaterial, and upon theſe, if there had been a verdict for the defendant, he could not have had judgment: But the ſubſtantial iſſues being rightly found againſt him, the judgment of ouſter is well founded. The granting of new trials is in lieu of attaints, (as it was laid down in *Barker* and *Dixie*, *Trin.* * 10 *G.* 2. in this court*): * P 261 And where there was a falſe oath upon a part not material, an attaint would not lie. 11 *Co.* 13. *a.* S. C. 1 *Roll.* 281. D. *pl.* 1. And this caſe was compared to that of a prohibition, where, beſides

* *Barker* and *Sir Woolſton Dixie*, *Trin.* 10 *G.* 2. In an action for maliciouſly indicting the plaintiff for felony, the plaintiff proved, that ſhe expended above 100l. in her defence upon the indictment; and the jury found a verdict for the plaintiff, but gave only five ſhillings for damages. And for this reaſon a new trial was prayed by Mr. *Strange* on the ſide of the plaintiff. But by *Hardwicke* C. J. and the reſt of the court it was denied, the ſmallneſs of damages being not a ſufficient ground for granting a new trial: And they ſaid, that an attaint (in the place of which the granting of new trials is now ſubſtituted) doth not lie for that reaſon. To which point *Lee* C. J. there cited 6 *E.* 4. 6, 7. *(A.)*

2 Stra. 1051 Caſ. T. Hardw. 279. S. P. Stra. 425. 940. Salk. 647.

the plea on the merits for a conſultation, not guilty is always pleaded to the contempt, and upon this laſt point a verdict is found, though no evidence is ever given thereon. So in treſpaſs *vi & armis*, not guilty is always pleaded to the force, and ſometimes a juſtification to the other part, but on the firſt plea there is never any evidence given, and yet a verdict is always found thereon. And ſo where a right is claimed under a charter, if *non conceſſit* is pleaded, and no charter is found, it is quite immaterial whatever is found on the other iſſues. It was further argued, that there is a plain difference where ſeveral and diſtinct matters are in iſſue, and where there are ſeveral iſſues upon one and the ſame matter. Now this laſt is the preſent caſe, the only queſtion here being, whether the defendant was well elected: And if a verdict be rightly given upon this point, though nothing had been found upon the other iſſues, it would have been ſufficient. And theſe books and caſes were cited: *Yelv.* 148. 2 *Roll.* 707. *pl.* 47. *Caſes in the time of K. Will.* 3. 275. S. C. cited in *Parker* and *Gordon*, *Mich.* 2 *G.* 2. and agreed for law. *King* and *Pindar.* (*a*) There in a *quo warranto* againſt the defendant for acting as mayor of *Penryn* in *Cornwal*, it was found that he was well elected, but not duly ſworn in; and afterwards a *mandamus* was granted to ſwear him in, to which the judgment of ouſter was returned: And the court was of opinion, that the judgment amounted to a total excluſion; and therefore refuſed a peremptory *mandamus*. And the caſe was carried up to the houſe of lords, and there the judgment below was affirmed. *King* and *the mayor, &c. of Shrewſbury.* (*b*) In that caſe there were many iſſues, ſome of which were found one way, and ſome another; but the only material queſtion was, whether the aſſembly, by which *Kynaſton* was amoved from the

i. e. 12 Mo.

(*a*) Ante 123.

* P 262

(*b*) Ante 271. n. See references in p. 85.

the place of alderman, was duly held, or not; and it appearing that the aſſembly was not well held, the court granted a peremptory *mandamus* to reſtore him. It was alſo urged, that if the two iſſues found againſt evidence are not material on this information, they cannot be ſo in any other cauſe: For a verdict is no evidence but in that part only which is material; all one as a record is no eſtoppel in any part thereof which is immaterial. 1 *Roll.* 871. *pl.* 12. And ſo a judgment in one action, unleſs it be obtained on the merits, is no bar in another. 2 *Lev.* 210. But ſuppoſing theſe iſſues may be material in another cauſe, there is no caſe to warrant the granting a new trial for this reaſon. And beſides, the coroner may conſent (by way of entry upon the record) that no advantage ſhall be taken thereof: For ſpecial entries have been made, where juries have not been ſo exact as they ought.

But *per curiam*, although the judgment of ouſter is well founded, if upon the whole the title is found againſt the defendant, yet it is another queſtion, whether a new trial ought not to be granted; for the jury ought to have found a verdict upon all the iſſues according to truth. There ought alſo to have been a ſeparate verdict upon each iſſue; for as this verdict is, it does not appear upon what part of the pleadings it is founded, ſo that poſſibly it may be given on that part which is immaterial, and which is found againſt evidence. And *Lee* C. J. mentioned the caſe of a *quo warranto*, tried at the bar; where there were ſeveral iſſues, ſome of which were not material, and yet the jury were aſked what they found upon theſe.

Mr. ſolicitor obſerving which way the court were inclined, ſubmitted to a new trial: Which was granted on payment of coſts.

* P 263 **Andrews, on the demiſe of Jones*, againſt *Fulham*.

S. C. 2 Stra. 1092. 2 Eq. ab. 294. Fearne conting. Rem. 401.

UPON a trial in ejectment, (which was before lord *Hardwicke*, when he was chief juſtice of this court) a caſe was ordered to be ſtated for the opinion of the court: And it was briefly this:

Robert Wight being poſſeſſed of certain lands in fee, and alſo of ſeveral houſes for the remainder of a term of ninety-one years, by his laſt will dated 8 *December* 1686. deviſed to his wife *Catharine* all his lands whether freehold or leaſehold for her life, and after her death, "to ſuch child as my ſaid "wife is now ſuppoſed to be pregnant with, and to "the heirs of ſuch child for ever; provided that if "ſuch child ſhall die before the age of twenty-one, "having no iſſue of its body, then the reverſion of "one third of the ſaid lands, *&c.* ſhall go to my ſaid "wife and her heirs for ever;" and then he deviſes the

Teſtator bequeaths leaſeholds to his wife for life and after her death "to ſuch child as ſhe is now ſuppoſed to be pregnant with, and to the heirs of ſuch child for ever; *provided that if* ſuch child ſhall die before the age of twenty-one, having no iſſue of its body, then the reverſion" to his wife and two ſiſters and their heirs reſpectively in thirds. The teſtator's wife never was enſeint. This deviſe to the wife and ſiſters is good, and took effect notwithſtanding.* V. *Bradford* v. *Foley*, Doug. 63. *Statham* v. *Bell*, Comp. 40. *Avelyn* v. *Ward* 1 Veſ. 420. *Fonereau* v. *Fonereau*. 3 Atk. 315.

* There have been four determinations upon the point, on this ſame will. 1ſt. By Ld. *Harcourt* in *Jones* v. *Weſtcomb*, Prec. Cha. 316. Gilb. Eq. Rep. 74. 1 Eq. ab. 245. where the point aroſe in reſpect to the leaſehold eſtate, and his lordſhip held the deviſe over good. 2dly. In this caſe of *Andrews* v. *Fulham*, a like determination. 3dly. In *Roe* v. *Wicks* C. B H. 1741. Upon an ejectment for the *freehold*, the court held that the deviſe over never took effect. This caſe is cited 1 Wilſ. 107. 2 Stra. 1093. 1 Veſ. 421. 3 Bur. 1624. (The reader will find a report of it in the appendix to theſe reports.) 4thly In *Gulliver* v. *Wicket*, M. 1745. 1 Wilſ. 105. The court of King's Bench, upon the freehold eſtate, held the deviſe over good.

two

two other thirds of the premiſſes, in like manner, to each of his two ſiſters *Anne* and *Elizabeth*, and makes his wife executrix. The teſtator ſoon afterwards died, but after his death *Catharine* his wife had no miſcarriage or child before her marriage with one *Jones*, which was ſeveral years after the teſtator's deceaſe. In *December* 1686. *Catharine* proved the will, and aſſented to the bequeſt of the houſes, and enjoyed the ſame till her death, which happened 1729. And 26 *June* 1730. adminiſtration of the goods of *Robert* the teſtator, unadminiſtred by *Catharine*, *cum taſtamento annexo*, was committed to *Edward Jones* her ſon, who is the leſſor of the plaintiff. And this ejectment was brought againſt the daughters of *Anne*, one of the ſiſters of the teſtator, for one third of the leaſehold premiſſes. And the queſtion was, whether the ſame belongs to the leſſor, as adminiſtrator *de bonis non* of *Robert* the teſtator, or is well bequeathed to *Anne* the ſiſter. * P 264

*The caſe was argued *Michaelmas* term laſt by Mr. *Bootle* for the leſſor of the plaintiff, and ſerjeant *Eyre* for the defendants; and in *Hilary* term laſt by ſerjeant *Wright* for the leſſor, and ſolicitor general *Strange* for the defendants.

On the ſide of the leſſor of the plaintiff it was argued, that in this caſe the queſtions proper to be conſidered are theſe two: (1) Whether the deviſe, after the death of *Catharine*, to ſuch child as ſhe is ſuppoſed to be pregnant with, be a good deviſe. And (2) Suppoſing this to be good, whether the further diſpoſition, under the proviſo, of the reverſion of the premiſſes by thirds to the teſtator's wife and ſiſters and their heirs, is good or not. As to the firſt point, it is certain that a preſent deviſe to an infant *in utero matris* is void, but a future deviſe to ſuch an one is good:* And ſuch a deviſe is con-

* Upon this diſtinction, ſee Fearne's Conting. Rem. 426, &c. and the caſes there referred to.

tingent,

tingent, and the law will wait for the contingency, as for a thing that will naturally happen. The preſent deviſe therefore is good; and it is to be conſidered in the nature of a remainder to the firſt and other ſons unborn, in the common courſe of diſpoſition and ſettlement; not as to a perſon actually *in eſſe*, but as to one who will ariſe according to the common courſe of nature. A deviſe to a monk, &c. is materially different, becauſe he is merely an imaginary perſon; and he is not capable of taking either *in præſenti* or *in futuro*, becauſe his deraignment depends not on his own will. *Moor* 637. 2 *Roll.* 425. D. 1 *Roll. R.* 254. S. C. 2 *Bulſt.* 272. S. C. *Cro. Jac.* 376. *Raym.* 164. It will probably be objected that this deviſe is void, becauſe it is a deviſe to one who never had a being; whereas an infant *in utero* is *in eſſe*, and may be vouched, according to 9 *H.* 6. 24. And it muſt be admitted that a child *in ventre ſa mere* may be vouched: But that is from the neceſſity of the thing, and he is vouched as one, not as actually exiſting, but as one that may be *in eſſe*; for he can be vouched only in this manner, if God give him birth. 38 *E.* 3. 29. *Co. Lit.* 390. *a.*

* P 265 But before his birth he is regarded as a non-entity. *Moor* 637. *Hob.* 3. *Co. Lit.* 11. *b.* 100. *b.* *245. *b.* 1 *Co.* 99. *Cro. Car.* 87. *Salk.* 227. S. C. 3 *Lev.* 408. S. C. *Carth.* 309. To the other point, whether the diſpoſition over is good or not, it was urged, (1) That it cannot take effect as an executory deviſe, becauſe it depends on too many and too remote contingencies. The contingencies here are no leſs than four in number, *viz.* the death of the wife, the birth of the child, the child's death before twenty-one, and (laſtly) the child's dying without iſſue: Whereas to make a good executory deviſe, there ought to be but one contingency. 1 *Roll.* 612. 1 *Mod.* 115. Beſides, if this be a good executory deviſe,

deviſe, a perpetuity might have been hereby created. For if a child had been born, and had died within age leaving iſſue, this iſſue might enjoy the eſtate for ſeveral generations; and yet if at laſt there is a failure of iſſue, it falls within the proviſo of dying without iſſue. *F. N. B.* 220. *Palm.* 133. 1 *Sid.* 451. It is alſo neceſſary that the contingencies ſhould happen, in order to make an executory deviſe effectual, which here they did not. (2) This deviſe cannot take effect as a conditional limitation; but it is a contingent one, and the contingencies are in the nature of ſo many conditions precedent. This conſtruction is moſt agreeable to the deviſe to the child, which carries the teſtator's whole intereſt both in the freehold and leaſe-hold eſtates; and the ſubſequent words are collateral to and diſtinct from the firſt deviſe. It is alſo obſervable, that under the proviſo nothing is given over by way of remainder, but the teſtator gives the reverſion of the premiſſes, ſo that he ſuppoſes the poſſibility of a reverter to him. And beſides, the word [provided] is a proper word of condition, and more eſpecially the word [if] which is always conditional. 1 *Mod.* 35. It was therefore neceſſary, before this limitation can be effectual, that the ſeveral contingencies ſhould happen: But as they have not, the limitation is void. *Pell* and *Brown*, *Cro. Jac.* 590. S. C. *Palm.* 131. *Cro. Car.* 185. *Greſwick* and *Warren*, (*a*) *Eaſt.* 9 *W.* 3. in *K. B.* In ejectment a ſpecial verdict was found, whereby it appeared, that a leaſehold eſtate was deviſed to an infant *en ventre ſa mere*, if it ſhould be a ſon; and if *it ſhould be a ſon, and he ſhould die during his minority, then the premiſſes were deviſed to a grandſon of the teſtator. The child was born, but happened to be a daughter. And it was adjudged

(*a*) Poſt. 271.—12 Mod. 128.

* P 266

ed that the executor, and not the grandſon, was intitled to the eſtate. *Jones* and *Brookes*, in Chancery, before lord chancellor *Talbot*, *Mich.* 1736. A man by his will gave to his wife all his braſs, pewter and houſhold implements, for and during the time ſhe ſhould continue a widow, and if ſhe ſhould marry again, then to his heirs. And in that caſe there were two queſtions; (1) Whether this bequeſt to the wife, whom he made executrix, ſhould exclude her from the ſurplus of the perſonal eſtate. (2) Whether the limitation over ſhould take place, the wife being dead, without having been married after the teſtator's deceaſe. And it was determined, (1) That the goods being given over on a contingency, this was no indication of the teſtator's intent to exclude her from the *reſiduum*, and conſequently ſhe was intitled to it. (2) That the contingency never happening, the bequeſt over could not take effect.

On the other ſide it was argued, that the deviſe to the wife and ſiſters is good, whether the firſt deviſe be conſidered either as originally void, or as good in its creation, and ſince ſpent. But it was inſiſted, (1) That this deviſe is abſolutely void, becauſe it is a deviſe to one who never was *in eſſe*: For here it muſt be taken, that the wife was not actually with child. So a deviſe to a monk, who is not more an imaginary perſon than a child unbegotten, is void. 2 *Roll.* 415. C. *pl.* 6. S. P. *Perk. ſ.* 566, 567. The ſame law of a deviſe to an alien. 2 *Sid.* 23, 51. So if there be a deviſe to one who is *in rerum natura*, and he dies before the teſtator, it is all one as no deviſe. *Plowd.* 345. *Cro. Eliz.* 422. S. P. *Hopkins* and *Hopkins*, (*b*) lately in Chancery, before lord *Talbot*. Objected, That an infant *en ventre ſa mere* is not regarded in law. Anſwer: This is not true; but on the contrary the law hath ſo great a regard to enfienties,

(*b*) Cas. T. Talbot. 44.

enſienties, that it hath broke through its own rules to provide for them. However, it doth not follow * P 267
*from hence that the law will ſhew any indulgence to children unbegotten. As therefore the firſt deviſe is void, no circumſtances attending it are to be taken notice of by way of obſtructing the ſubſequent deviſes. *Plowd.* 414. 1 *Co.* 101. *a.* So that in effect the leaſehold premiſſes are here deviſed to the wife for life, and then, as to one third, to her executors and adminiſtrators for the remainder of the term, and as to the other two thirds, to the ſiſters for the reſidue of the term; but it being doubtful whether the firſt deviſee will outlive the term or not, the deviſe over will remain executory until ſuch deviſee dies. Under this queſtion were alſo cited *Dyer* 303. *b.* 1 *Lev.* 135. S. C. *Raym.* 162. 2 *Sid.* 135. (2) It was argued, that the limitation over is good by way of executory deviſe. For the four contingencies mentioned on the other ſide are properly reducible to two; and they muſt all happen in the ſpace of twenty-one years at furtheſt, which hath always been thought a reaſonable time for theſe deviſes to take place in. *Palm.* 132. *Maſſenburgh* and *Aſh*, 1 *Vern.* 234, 257, 304. S. C. 2 *Ch. Rep.* 275. *Scatterwood* and *Edge*. *Salk.* 229. 2 *Vern.* 151. (in point). And in *Lloyd* and *Carew*, (*c*) in the houſe of lords, a year beyond a life was allowed ‡. As to the proviſo, this is not to be taken as a condition precedent, but as part of the deviſe: For in wills, the grammatical conſtruction of words is not ſo much to be regarded as the intent of the teſtator. *Plowd.* 21. And here it is plain the teſtator intended that the ſiſters ſhall take; and this intent ought to take place, as the

(*c*) Shower. P. C. 137. Prec. Cha. 27.

‡ Executory deviſes limited to veſt within twenty-one years after a life in being are good. Vide Fearne's Conting. Rem. 318. *Dee.* v. *Fonereau*. Doug. 490.

rules

rules of law will not be infringed thereby. For the words [provided] and [if] have no determinate ſenſe; and are ſometimes conſtrued as words of limitation. And that in the preſent caſe, the words ought to be conſtrued in this manner, appears by the caſes in *Moor* 487. *Co. Lit.* 203. *b.* 2 *Sid.* 152. *Raym.* 427. 3 *Lev.* 125. *Salk.* 229, 570. And particularly by *Jones* and *Weſtcomb*, *Abr. Ca. Eq.* 245. which is a caſe upon this very will, and on the clauſe now in queſtion, and is therefore directly in point.

1 Vef. 421. As to *Greſwick* and *Warren* cited *contra*, Mr. *ſolicitor*

* P 268 ſaid, that no roll thereof is to be *found: And it ap-

12 Mod. 128. Poſt. 271. pears by the report of that caſe in ——— *fol.* 245. to have been adjudged without argument. And in *Jones* and *Brookes*, the deviſe is to a perſon in being, and a particular act was expreſly required to be done before the deviſe over could take place; and therefore it differs from this caſe.

After having taken the caſe into conſideration, *Lee* C. J. this term delivered the reſolution of the court to the following effect:

The preſent queſtion is, whether the leſſor of the plaintiff, as adminiſtrator *de bonis non* of the teſtator, is intitled to the leaſehold eſtate, as a part undiſpoſed of by the will; or whether it ſhall go in thirds to *Catharine* the wife, and the two ſiſters. Now to determine this, it is neceſſary to conſider the ſeveral deviſes contained in the will, and in what manner they operate. The firſt deviſe is to *Catharine* the wife for life, which plainly is a good deviſe: And it was aſſented to by the executrix, and the eſtate enjoyed accordingly. The next deviſe is, to ſuch child as the wife is ſuppoſed to be *enſient* with. Now though it was formerly much doubted, whether a deviſe to an infant *en ventre ſa mere* is good or not, yet it is now a ſettled point that ſuch a deviſe is good, notwithſtanding

withſtanding there is a caſe in *Carter's Rep.* to the contrary: And ſo it appears by *God. Orph. leg.* 385. 386. and 1 *Salk.* 230. It is next to be conſidered, what intereſt is deviſed to the infant after the wife's death. The teſtator deviſes his eſtate (which includes his leaſehold) to him and his heirs: And though this be an improper manner with reſpect to the leaſehold eſtate, yet it certainly carries the whole intereſt therein to the infant. But then by the words of the proviſo, his intereſt is made determinable upon his dying without iſſue before twenty-one. Now though the words [provided that if] are proper words of condition, yet it is uſual for words of condition to be taken as words of limitation or determination, where a remainder is given over: And ſo is 1 *Vent.* 202. and the *opinion of lord *Holt*, in *Page* and *Hayward*, 2 *Salk.* 570. I have ſeen the reſolution of lord *Holt* in that caſe, under his own hand, (which is much fuller than it is ſet out in *Salk.*) wherein, after ſaying, that the words [upon condition] do not make the eſtate conditional, but are words of limitation, he gives ſeveral inſtances thereof. Taking this proviſo therefore to be a limitation, the contingencies there mentioned muſt either happen, or become impoſſible to happen, before the deviſe can take effect. Now theſe facts are, the death of the wife, and the death of the child without iſſue before twenty-one. The former hath happened, but the other not, nor can it poſſibly happen, becauſe the woman is dead without having had any child. The queſtion then is, whether notwithſtanding the deviſe over to *Catharine* and the ſiſters may not take place. To this it is objected that it cannot, becauſe it is to operate at too great a diſtance of time. But this objection is fully anſwered by the caſes of *Maſſenburgh* and *Aſh*, 1 *Vern.* 234. and of *Martin* and *Long*, 2 *Vern.* 151. As to the other point, whether the deviſe over is good,

Cart. 5.

* P 269 Piggot, 176.

good, and can take place, as there hath been no child, we are all of opinion, that as the deviſe to the child became null, the proviſo fell too, and is wholly to be thrown out of the caſe. In *Scatterwood* and *Edge*, (*d*) (which I have from a manuſcript report) it was objected by ſerjeant *Lutwyche*, (upon the argument thereof in the Common Pleas) that though the firſt deviſe to the iſſue of *A.* ſhould be conſidered as void, yet the deviſe to the firſt ſon of *B.* could not take place, becauſe it depended on a precedent condition, *viz.* a refuſal by the iſſue of *A.* to take the ſurname of *Edge*, on their dying without iſſue male; and this was impoſſible to happen, becauſe *A.* was dead without iſſue. And the court agreed, that taking thoſe facts by way of condition precedent, what he ſaid was right; but they held, that they were not to be conſidered as a condition, but as part of the deviſe, which was abſolutely void. And the court ſaid, that if there be a deviſe to a monk, with a remainder over, the remainder ſhall take effect immediately; but if lands are given to one after the death of a monk, *the monk's death muſt firſt happen. But Mr. juſtice *Blencowe* differed from the reſt of the court upon the principal point. That was in the caſe of a freehold and inheritance, where an eſtate-tail was deviſed, upon which a remainder might be limited: But if the deviſe had been to *A.* in fee, it would have been a different conſideration, whether a future deviſe to take place on the happening of preceding contingencies can be effectual unleſs the facts actually happen, becauſe in this caſe the limitation cannot be conſidered as a remainder over, but as an executory deviſe. I ſhall however give no opinion upon this point, becauſe the preſent caſe is that of a term; and therefore the deviſe muſt here operate in the nature of a limitation; (for there cannot

(*d*) 1 Eq. ab. 189. 1 Salk. 229. 12 Mod. 278.

* P 270

not properly be a limitation of a term) and conſidered as ſuch, it is a good deviſe. 2 *Vern.* 151. S. C. *Abr. Ca. Eq.* 192. It may be objected, that if the law be ſuch as is above mentioned, in caſes where the firſt deviſe is originally void, yet that it is different where it is originally good, and afterwards becomes void. But I think, that in both caſes the law is the ſame. As the law allows of deviſes to infants *en ventre*, ſo it will wait until their birth; but if none are born, it is all one as if there was no deviſe. *Perk. ſ.* ——— This is the preſent caſe; and as the deviſe is to be conſidered as a limitation, the eſtate muſt go to the next perſon who is capable of taking; as appears by *Moor* 487. In that caſe it is obſervable, that the deviſe to the fourth ſon is a good limitation of a contingent remainder in tail-male, which muſt have taken effect if the ſon had been born; but as there was none, the limitation to him was conſidered as void: And there too the words are conditional. Upon the whole therefore, taking this deviſe to the infant to be void, becauſe there was no child, and the proviſo being to be conſidered as part of the deviſe to the child, the deviſe over, which is in the nature of a limitation of a precedent intereſt deviſed to the infant, is good. And with this agrees the opinion of lord chancellor *Harcourt*, in *Weſtcomb* and *Jones* (*e*) (which was a caſe upon this very will, and upon the ſame point, and in relation to the ſame eſtate, *which are now in queſtion) for by the decree he declares, that the deviſe to *Catharine* and the ſiſters is good, though the wife was not *enſeint*. The only caſe which ſeems contrary to the preſent opinion of the court is that of *Greſwick* and *Warren*, (*f*) *Eaſt.* 9 *W.* 3. in this court. I have a manuſcript report of the caſe, which was this: A perſon poſſeſſed

(*e*) 1 Eq. ab. 245. Gilb. Eq. Rep. 74. Prec. Cha. 316. * P 271

(*f*) 12 Mod. 128. by name of *Graſcot* v. *Warren*. S. C. *Comb.* 437. by name of *Eſtcourt* v. *Warry*.

poſſeſſed of a term of years, deviſed it to an infant *en ventre ſa mere*, if it ſhould be a ſon; and if it ſhould be a ſon, and he ſhould die in his minority, then to teſtator's grandſon: The child was afterwards born, and it proved to be a daughter. And it was adjudged, without argument, that the executor ſhould have the term, and not the grandſon, becauſe he was to have it on a precedent contingency, which was neceſſary firſt to happen. But that is different from the preſent caſe, for there the being of a ſon is made one of the conditions upon which the deviſe over is to take place: And the law is certainly ſo in the caſe of a condition precedent. Here, on the contrary, the deviſe to the child is abſolute and unconditional, and the words of condition are comprehended under a ſubſequent proviſo.

The *poſtea* was therefore ordered to be delivered to the defendant, and the plaintiff to pay the coſts of a nonſuit.

Crofts, on the demiſe of Dalby, againſt *Wells*.

To obtain a trial at bar, the caſe muſt be of difficulty, or require great examination; and the matter in queſtion be of conſiderable value.

MOTION for a trial at bar in ejectment, upon an affidavit that the eſtate in controverſy is between 200*l.* and 300*l.* *per ann.* and that other eſtates of great value depended on the ſame queſtion with the preſent; which is about the execution of a will. And it was urged by Mr. *Chute* and Mr. *Marſh*, that value alone is ſufficient to induce the court to try cauſes at the bar: And they relied on 2 *Salk.* 648.

But

*But *per curiam*, notwithſtanding that caſe, the general rule the court now goes by (grounded on the ſtatute of *Weſtm.* 2. *c.* 30.) is, not to grant trials at bar unleſs the caſe is of difficulty, or requires great examination; and though it is alſo neceſſary that ſomething of value ſhould be in queſtion, the other circumſtance is the principal ingredient. And *Page* juſt. ſaid, that he was counſel in the caſe reported in *Salk.* 648. and he believed the reporter to be miſtaken in making lord *Holt* allow either value or difficulty to be ſufficient for having a trial at bar; for that in lord *Holt*'s time the practice was not to grant a trial at bar, unleſs difficulty was alſo an ingredient. * P 272

The court therefore in this caſe denied the motion, though (as *Lee* C. J. ſaid) the matter here in debate is of ſufficient value.

In *Preſton* v. *Liegon.* Stra. 479. a trial at bar was granted upon the *common affidavit of value.* But ſee *Holmes* v. *Brown.* Doug. 420. *Rex* v. *Caermarthen.* Say. 79. where it is held that the particular difficulty muſt be pointed out, and *Rex* v. *Amery* 2 Term Rep. B. R. 363. alſo *Froſt* v. *Wheadock.* Barnes. 447.

The

The King againſt *Soane.*

Information granted againſt a Juſtice of peace for acting oppreſſively. Of warrants granted without oath. V. 1 Hale H. P. C. 582. 2 Hale H. P. C. 111.

AN information was prayed againſt the defendant, a juſtice of peace, for ſeveral miſdemeanors in the execution of his office; one of which was, the iſſuing out a warrant to apprehend a perſon for the non-payment of a ſervant's wages, without any previous oath.

And the whole court were clearly of opinion, that ſuch warrant ought not to have been granted without oath, eſpecially as this was only a civil demand: And the proper way is to ſummon the party, and afterwards proceed to conviction. And *Lee* C. J. mentioned the caſe of Sir *William Wyndham*, (*a*) *Trin.* 2 *G.* 1. not as applicable to the preſent, but as a very material one upon this ſubject. Sir *William* was committed upon a warrant for high treaſon; and it was objected to the warrant, upon the return to the *habeas corpus*, by ſerjeant *Pengelly* and others, that it is not ſet out in the warrant that it was granted upon oath. *But it was held by *Parker* C. J. and the reſt of the court, that the warrant is good: And ſo, lord *Parker* ſaid, it was reſolved in *Ferguſon*'s caſe, 2 *W.* & *M.* And he ſaid further, that in many caſes a man may be committed without oath; as where ſuſpicious papers are found about him; and that this was the opinion of all the judges, as it was delivered by Sir *Peter King* to the houſe of lords.

4 Burn's Juſt. 389. 16th Ed.

(*a*) Stra. 2. V. *Wilkes's* caſe 2 Wilſ. 158.

* P 273

V. R. v. *Barby* Fort. 140.

The court alſo ſeemed to be of opinion in the principal caſe, that juſtices of peace have no juriſdiction in the caſe of ſervants wages, unleſs it be in thoſe of huſbandry: Which did not appear to be the preſent caſe.

Ante 226. V. Caldecot 14. n (*c*) Fort. 317.

An

An information was granted, not ſingly on theſe points, but principally on other facts, whereby it appeared, that the juſtice had acted very oppreſſively.

Martin againſt *Sparrow.*

MOTION for a trial at bar of a cauſe ariſing in the country: To which it was objected, that ſeveral of the witneſſes were very old and infirm. And Mr. juſtice *Probyn* remembered a caſe between the *Dukes of Somerſet* and *Wharton*, in relation to the manor of *Cockermouth* in *Cumberland*, where, though the eſtate was of great value, and the matter of great intricacy, yet the court refuſed a trial at bar, becauſe many of the witneſſes were very old and infirm, and ſcarce able to come to town: And the cauſe (he ſaid) was afterwards tried before himſelf in the country.†

Age and infirmity of witneſſes living in the country, objected to a motion for a trial at bar.

See alſo *Froſt* v. *Whalock.* Barnes. 447.

In the principal caſe, a trial at the aſſiſes was agreed to upon terms.

† In *Holmes*, v. *Brown*, Doug. 420. a like objection was made, ſo the Court put the party applying under terms that the old witneſs ſhould be examined upon interrogatories, and her depoſitions read, if ſhe ſhould die before the trial. See Lord *Hillſborough* v. *Jefferyes*. Barnes 438.

* P 274 **The King* againſt *Pawlet.*

One claiming the benefit of the act of Pardon, 9 *Geo.* 2. c. 35. ought to do it by ſuggeſtion on the record. An application on behalf of a creditor to have him turned over to another priſon, is improper.

THE defendant was committed to a county-gaol, by the commiſſioners of exciſe, upon a conviction for keeping tea in an unlicenſed room, contrary to the exciſe-laws; which impoſe the penalty of 200*l.* for ſuch an offence: And he being now brought up by *habeas corpus*, it was moved by Mr. *Ketelby*, on the behalf of one *Dennet*, a creditor of the defendant, that the defendant might be turned over to the *Marſhalſea*, he being pardoned by the ſtatute of 9 *G.* 2. *c.* 35.

On the other ſide it was argued by attorney general *Ryder*, and ſolicitor general *Murray*, that the defendant being in cuſtody at the ſuit of the crown, he ought not to be turned over to another priſon, at the inſtance of a private perſon, for debt: And ſo it was determined in *Boyſe*'s caſe. Beſides, this is not the regular way for the defendant to take advantage of the act, ſuppoſing he is pardoned thereby, (which, they ſaid, he was not) but (on the contrary) it is directed to be by pleading.

And the whole court were clearly of opinion, that this is not a proper method taking of advantage of the act; but it ought to be by ſuggeſtion on the record, that the crown may be at liberty to traverſe it; and therefore they denied the motion.

Lee C. J. alſo ſaid, that he was not ſatisfied that a perſon in cuſtody for the crown can be turned over

to

to another priſon; and there is a caſe, where it is held he cannot.

N. B. This matter was firſt moved laſt term, and the court then refuſed, for the ſame reaſons as were now given, to grant any rule.

* P 275
S.C. 2 Stra. 1094.

**Cole* againſt *Hawkins.*

Merely ſerving proceſs upon a party attending his cauſe in Court is a contempt.

MOTION by Sir *Thomas Abney*, for an attachment againſt one *Whitten*, an attorney, for ſerving the copy of a bill of *Middleſex* upon the defendant, in an action of aſſault and battery at the ſuit of one *Lawes*, whilſt *Lee* C. J. was hearing cauſes at *niſi prius* in *Weſtminſter-hall*, and the defendant was upon the ſteps leading to the court, attending his cauſe, which was then juſt going to be called on. And Sir *Thomas* ſaid, that he remembered a caſe, where the ſervice of a juſtice's ſummons upon a perſon attending the court whilſt it was ſitting, was held to be a contempt.

On the other ſide it was argued by ſolicitor general *Strange* and others, that the protection which the law gives to perſons in theſe caſes, extends to them only *eundo & redeundo*; and it does not include the ſerving of a proceſs, as this is no reſtraint upon the perſon. Beſides, ſuppoſing the ſervice to be irregular, yet it is no contempt, eſpecially as it did not hinder, or tend to hinder, the trial from going on; and the defendant's preſence was not neceſſary. But (by *Lee* C. J.) the protection which the law gives in

theſe caſes, as well to the parties to cauſes as their counſel and attornies, extends to them *eundo, redeundo & morando*; and if the ſerving of proceſs upon perſons attending courts were to be allowed, it would produce much terror and great diſtraction in buſineſs.

And the whole court (except *Page* juſt, who heſitated) were clearly of opinion, that the ſervice of a proceſs in the ſight of the court is a great contempt, and puniſhable by attachment. And they ſaid, that perſons have been frequently laid by the heels for making arreſts in thoſe caſes, where they have refuſed to diſcharge the party arreſted. And *Lee* C. J. ſaid, that where this hath been agreed to, yet in the firſt inſtance the court hath laid hold on the officer for
* P 276 the contempt. But, he ſaid, it is *another conſideration, whether ſuch execution of a writ be void, ſo that the party ſhall be diſcharged.

However, in this caſe the attorney, (who was in court) declaring that he ſerved the writ through mere inadvertence, and ſubmitting to pay the coſts, and waive the proceedings, the rule granted to ſhew cauſe, *&c.* was diſcharged.

Wellis

Wellis againſt *Nicholſon.*

PER curiam: In the caſe of an executor of an attorney, the teſtator's bills are not ſubject to taxation upon the ſtatute of 2 *G.* 2. *c.* 23. the words thereof not extending to an executor. And the court ſaid, that in a late caſe, on the motion of ſerjeant *Parker*, it was held, that in ſuch caſe the bill need not be ſigned.

The plaintiff's teſtator's bill of coſts is not ſubject to taxation under 2 *Geo.* 2. *c.* 23. nor need the bill be ſigned in ſuch caſe.

See *Lee* v. *Knight*, Barnes, 119. *Chapple* v. *Chapman*, Barnes, 122.

The King againſt *the inhabitants of Marton.*

ERROR of a judgment upon an indictment againſt the inhabitants of a townſhip, for not paving a cartway: And it was aſſigned for error by Mr. *Willbraham*, (1) That in the preſentment the jury have not ſaid, that the way is out of repair. (2) It is ſaid only, that the inhabitants, *&c.* ought to repair the ſame: whereas this being in the caſe of a townſhip, which by cuſtom only is obliged to repair, it ought to have been averred, that they have from time out of mind repaired, *&c.* for of common right pariſhes are bound to repair. 1 *Vent.* 183, 189.

Indictment againſt a townſhip for not paving a cartway; judgment on it, reverſed.

And

And none appearing on the other ſide, the judg-ment was reverſed, without any opinion being given by the court, upon the above exceptions.

Mr. juſtice *Page* alſo objected, that the indictment is, for not paving; whereas certainly the townſhip is not obliged to pave, but only to repair.

*Michaelmas Term, *P. 277

12 Geo. II. 1738.

Sir *William Lee*, Chief Juſtice.

Sir *Francis Page*,
Sir *Edmund Probyn*,
Sir *William Chapple*, } Juſtices.

Brooks againſt *Crowſe*.

S.C. 2 Stra. 1101. *Clowes* v. *Brooke*.

To *aſſumpſit* for a farrier's bill, the defendant pleads infancy. The plaintiff ought to reply that the phyſic, &c. was neceſſary for the defendant; or, for the horſes of the defendant kept for his neceſſary uſe.

IN *aſſumpſit* by a farrier for providing phyſick and other things for the defendant's horſes, the defendant pleads infancy; and the plaintiff replies, that the phyſick and materials ſo provided, *&c.* were neceſſary for the horſes of the defendant: To which the defendant demurs.

And it was argued by Mr. *Deniſon* for the defendant, that an infant is under the protection of the law, and is not thereby ſuffered to contract for any thing

thing but mere neceſſaries for himſelf, as apparel, meat and learning: And even a contract by one for being an apprentice is not binding, unleſs it be by the cuſtom of *London*. He cannot ſo much as contract for the maintenance of his own family, or the reparation of his own houſe. In all actions therefore againſt an infant, it muſt be alledged, that the work or things for which the ſuit is brought was neceſſary, or elſe they muſt appear to be ſo in the nature of
* P 278 the *thing. Now here it doth not appear either that the phyſick and materials, or even the horſes, were neceſſary for the infant; for he might have twenty horſes more than there was a neceſſity for. And upon this replication a proper iſſue could not poſſibly be joined: For the iſſue here could only have been, whether the phyſick, &c. was neceſſary for the horſes, and not whether the horſes were neceſſary for the infant: which is the matter that ought to have been put in iſſue. *Cro. El.* 583. *Cro. Jac.* 494, 560. *Cart.* 215. in point.

On the other ſide it was argued by ſerjeant *Bellfield*, that this application is good, becauſe it appears that the defendant had the horſes, which perhaps might be by will or donation; and it is admitted by the demurrer, that the phyſick, &c. was neceſſary for the horſes. It is not neceſſary, and it would make the pleading too prolix, to ſhew ſpecially in theſe caſes how the things are neceſſary; but the common way is, and hath been for many years, appears by many precedents, to reply generally, that they are neceſſaries: And under ſuch general iſſue every circumſtance, and particularly the rank and ſtation of the infant, will come properly before the jury.

It was replied (amongſt other things) that the plaintiff ſhould have ſhewn how the defendant came by the horſes, whether by donation or will, or in what

what other manner: But nothing of this nature appears. But to this Mr. juſtice *Probyn* anſwered, that this is not incumbent on the plaintiff, becauſe he is a ſtranger to the defendant's title.

And the whole court were clearly of opinion, that this replication is ill. For the only matter inquirable under it is, not whether the phyſick, &c. was neceſſary for the infant, but whether it was neceſſary for the horſes; whereas it ſhould have been replied, that the phyſick, &c. was neceſſary for the uſe of the defendant, or that the phyſick, &c. was for the horſes of the defendant kept by him for his neceſſary uſe: In both which caſes every *circumſtance would have come into conſideration. And ſo is the caſe in *Carth.* 110. *P 279

And *Chapple* juſt. ſaid, that horſes may be very fit for an infant, as on account of his quality or conſtitution. And by *Probyn* juſt. where infancy is pleaded, it muſt be ſhewn on the other ſide, that the goods or work were neceſſary for the infant perſonally, and not for any thing belonging to him.

Judgment for the defendant.

The

The King againſt *Willis*.

By 11 *Geo.* c. 4. a *Mandamus* lies, to a ſteward of a Court-leet, to hold a Court-leet and ſwear a jury that they may preſent *J. D.* duly elected mayor.

MOTION by ſerjeant *Eyre* for a *mandamus* to the defendant, as ſteward of the court-leet holden for the borough of *Chriſt-church* in *Hampſhire*, to hold a court-leet, *&c.* and then and there to ſwear and charge a jury to preſent all things proper to be preſented, in order that they may preſent to the ſteward *John Dale* the perſon duly elected mayor of the ſaid borough. And in ſupport of this motion, an affidavit was produced of the conſtitution of the borough, and of the election of *Dale* for mayor.

On the other ſide an affidavit was read, that another perſon had been choſen mayor. And it was alſo argued by ſolicitor general *Strange* and others, that upon the ſtatute of 11 *G.* 1. *c.* 4. *(ſ.* 2.) which is the foundation of the preſent motion, no *mandamus* lies for preſenting a particular perſon, but only a general *mandamus* for holding a court-leet, and doing all things neceſſary for the election of a mayor. And ſuch a *mandamus* only was granted in the following caſes, *viz. King* and *the capital burgeſſes, &c. of Harwich, Eaſt.* 2 *G.* 2. A *mandamus* was there granted to proceed to the election of a mayor, and to do all things neceſſary in relation thereto. [And
* P 280 Mr. *ſolicitor ſaid, this was the firſt *mandamus* that was granted upon this act.] *King* and *the corporation of High-Ferrers, Mich.* 4 *G.* 2. *Mandamus* to the ſteward of a court-leet to proceed to the election of a mayor.

mayor. *King* and *borough of Tintagen in Cornwal*, (a) *Eaſt.* 8 *G.* 2. A rule was there granted for a *mandamus* to a ſteward for holding a court-leet for the election of a mayor. And Mr. ſolicitor ſaid, that the only inſtance of ſuch a writ as the preſent being prayed, is in *Comb.* 239. and it was denied. Beſides, as in this caſe there are two perſons pretending to be elected, the writ now applied for will determine the queſtion beforehand; and alſo will oblige the jury to preſent a perſon as duly elected, when perhaps they believe that it is another.

(a) *Qu.* 2 Stra. 1003.

But the whole court were clearly of opinion, (and they would not ſuffer the counſel on the ſide of the motion to go through their arguments) that the *mandamus* well lies on the ſtatute of *Geo.* 1. For the plain intent of the act, which is very general, is to enforce the performance of all ſuch acts as are neceſſary for compleating the admiſſion or election of the officers or members of corporations, one of which is a preſentment. And as it is here ſworn that *Dale* hath been elected, there can be no harm in pointing out by the writ, what particularly the ſteward and jury, who are miniſterial only, are further to do. This can be of no prejudice to any, becauſe as this is not a peremptory *mandamus*, if *Dale* is not well elected, this, or any other matter ſuggeſted in the writ, may be returned; and then it will be in a proper method of trial. And *Lee* C. J. ſaid, that a *mandamus* hath frequently been awarded to grant probate or adminiſtration to particular perſons; which is ſimilar to the preſent caſe.

And (by *Chapple* juſt.) the court does not determine by the words, "to preſent *J. D.* the perſon duly elected," that he is duly elected; but the meaning is, that the jury are to preſent him as duly elected; or (in other *words) that this is the foundation on which they are to proceed. * P 281

Mandamus granted.

The

The King againſt *Bethuen.*

Return to an *Habeas Corpus* that the perſon was diſcharged out of cuſtody by an order of Seſſions, generally, is a good return for filing the writ.

AN *habeas corpus* was granted, (at the inſtance of the proſecutor) directed to the keeper of the *Gatehouſe* in *Weſtminſter*, where the defendant had been committed by juſtice *Deveil*, for bringing up the defendant: To which the keeper returned, that "before the coming of the writ, the defendant "was diſcharged out of his cuſtody by an order of "ſeſſions."

And upon a motion for an attachment againſt the keeper, and againſt filing the return, it was objected by Mr. *Hollings* and others, that the return is inſufficient, becauſe it does not mention by what ſeſſions the order of diſcharge was made, or what particularly the order is; or that the defendant was diſcharged by due courſe of law.

It was anſwered by ſolicitor general *Strange*, that if the return had been, that at the coming of the writ the defendant was not in the keeper's cuſtody, without mentioning any thing about the order, it would have been ſufficient; this being a full anſwer to the ſuggeſtion of the writ, that he is in this perſon's cuſtody: And as an order is mentioned, the court will intend that defendant was duly diſcharged, and by a ſeſſions having juriſdiction. Beſides, there is not always a particular order made, but only a general one, that ſuch a perſon whoſe name appears in the kalendar be diſcharged.

When

When this matter was firſt ſtirred, it was agreed by the court, (*Probyn* and *Chapple* juſtices, being only preſent) that if it had been only returned, that at the coming of *the writ defendant was not in the keeper's cuſtody, it would have been ſufficient: But they doubted, as this return is, whether it ſhould not have been ſhewn what the order is, and by what ſeſſions it was made. But time being then given for amending the return, the caſe was now again mentioned; and it was held by the whole court, (except *Chapple* juſt. who diſſented) that this is a good return for the purpoſe of filing the writ. *Ex relatione alterius.*

* P 282

Goodright againſt *Hodgſon.*

IN an action of treſpaſs brought for the meſne profits of an eſtate after a recovery in ejectment, the plaintiff declares upon two counts, *viz.* that the defendant, 2 *July*, 2 *G.* 1. *vi & armis* broke and entered into, *&c.* and drove out and removed the plaintiff from the poſſeſſion and occupation of the premiſſes, and with-held him being ſo driven out, *&c.* from the ſaid 2 *July* until the day of ſuing out of the original writ, and alſo took and had for all the time aforeſaid to his own proper uſe all the iſſues and profits of the premiſſes of the yearly value of 5*l.* And alſo whereas the ſaid *J.* (the defendant) on 2 *February*, 9 *G.* 2. *vi & armis* broke and entered into four other meſſuages, *&c.* and with-held the plaintiff, *&c.* from ſaid 2 *February* until the day of ſuing out the original

Upon one Count the plaintiff gets a verdict, the court will not arreſt the Judgment pending a demurrer as to the other. *Qu.* whether in Treſpaſs the want of a poſitive averment in the count is aided by the recital of the writ. V. *Smith* v. *Reynolds.* Ante. 21.

V. *Jervis v. Orchard*, Show. P.C. 199.—*Bull.* N. P. 88.

original writ. As to the firſt count, the defendant pleads, that he is not guilty of the treſpaſs within ſix years next before the day of ſuing out the ſaid original writ. To this the plaintiff replies, that defendant of his own wrong continued the ſame treſpaſs from the time of breaking and entering, *&c.* unto and within ſix years next before the ſuing forth the ſaid original writ, *&c.* which ſaid treſpaſs was one continued treſpaſs during all the time, *&c.* and the defendant demurs. As to the ſecond count, the defendant pleaded the general iſſue; and a verdict was given thereon for the plaintiff, and 3*l.* 14*s.* damages, with contingent damages on the demurrer.

* P 283 *And it was moved by Mr. *White* in arreſt of judgment, that the ſecond count in this declaration is ill, becauſe it is laid by way of recital, without any averment, which is abſolutely neceſſary in treſpaſs, whatever it may be in an action on the caſe. And he cited 1 *Sid.* 184. *Cro. Jac.* 536. 2 *Salk.* 636. *Norman* and *George*, (*a*) *Eaſt.* 4 *G.* 2. Error of a judgment in treſpaſs in *C. B.* and this court was of opinion, that the want of averment in the declaration is not cured either by the verdict or the writ.

(*a*) Fitz G. 255. 1 Barnard. 446. V. *Douglaſs v. Hall*, 1 Wilſ. 99.

On the other ſide it was argued by ſerjeant *Draper*, that in the Common Pleas, where the proceeding is by original, a declaration without any averment is aided by the writ; and this in treſpaſs, which does not ſubſtantially differ as to the preſent point from an action on the caſe. *Franklin* and *Reeves*, (*b*) *Mich.* 9 *G.* 2. In treſpaſs by original in *C. B.* the plaintiff declared againſt defendant, *quare fimum. cepit*, without ſaying [*ſuum*]: And in error, this being objected, the court held, it was aided by the writ: For which purpoſe were cited 2 *Lutw.* 1509. *Rogers* and *Gibbs* (*c*) *in C. B. Mich.* 4 *G.* 2. and *Clark* and *Lucas*, *Mich.* 2 *G.* 2. Beſides, in the preſent caſe,

(*b*) 2 Stra. 1023. Caſ. T. Hardw. 118.

(*c*) Fort. 376.

as

as the firſt count contains a poſitive averment, this helps the ſecond; in which the word [whereas] is to be conſidered as ſynonymous with [moreover]. 3 *Lev.* 338. But what the ſerjeant ſeemed principally to rely upon was, that as the judgment to be given is one intire judgment upon the whole record, it cannot be arreſted in part. To which point he cited *Robinſon* and *Moor in C. B. Rotl.* 1739. *Trin.* 2 *G.* 2. That was an action on the caſe upon two promiſes; one of which was on an agreement to box for a wager, and the other was for ſo much money had and received for the plaintiff's uſe. Defendant ſuffered judgment by default, and upon the execution of the writ of inquiry, the jury aſſeſſed on the firſt count ten pounds, and on the other three pounds, which were the ſtakes. And upon motion in arreſt of judgment it was objected, *that the judgment cannot be arreſted for part: To which the court agreed, and therefore they denied the motion; and left the plaintiff to enter a *noli proſequi* for any part, if he pleaſed. The ſame point (he ſaid) was determined in *Cave* and *Dane*, *Eaſt.* 2 *G.* 2. *in C. B.* * P 284

And the whole court were now of the ſame opinion, *viz.* that at preſent the judgment cannot be arreſted, becauſe the proceedings are not yet compleat, and it does not yet appear what the final judgment will be upon the whole record. When the demurrer is determined, it will be time enough to arreſt the judgment. And (by *Chapple* juſt.) the court will not then give ſuch a judgment as may be avoided by writ of error when they are appriſed of it beforehand. For this reaſon the motion was denied.

As to the other point, the court gave no opinion. And *Lee* C. J. ſaid, it was never determined in this court, that in treſpaſs a declaration by way of *quod cum*

cum is aided by the writ: And in *Franklyn* and *Reeves*, lord *Hardwicke* inclined to the contrary, becauſe the writ no more contained an averment than the declaration, it being only interrogatory, and without an averment, there is no cauſe of action. And *Chapple* juſt. now ſaid, that the difference between an action of treſpaſs and on the caſe is, that in the former, what comes under the *quod cum* is the giſt of the action; but otherwiſe it is in the other, where the plaintiff declares that the defendant is indebted, &c.

After the court had delivered their opinion, Mr. *White* moved, that the plaintiff be reſtrained from entring up judgment until the demurrer is determined. But this was denied. *Ex Relatione alterius.*

* P 285 **The King* againſt *the inhabitants of Middleſex.*

Ante 101. THIS caſe was now argued again by Sir *Thomas Abney* in ſupport of the order, and by Mr. *Lloyd* againſt it: And the ſingle point now ſpoken to was, (all the other objections to the order having been over-ruled) whether it is neceſſary upon the ſtatutes of 22 *H.* 8. *c.* 5. and 1 *Ann. ſeſſ.* 1. *c.* 18. for the jury to preſent by whom the bridge ought to be repaired; this order only mentioning, that it was preſented to be a publick bridge out of repair.

And (by *Lee* C. J.) although the ſtatute of queen *Anne*, on which the preſent queſtion wholly depends, is in the conjunctive, that "upon due preſentment, "&c.

"&c. that any bridge, &c. is out of repair, &c. "and which hath uſually been by them repaired, "&c." yet this latter part of the ſentence is to be conſtrued independent of the former, and is a declaration of what bridges, &c. the juſtices ſhall have cogniſance, *viz.* of ſuch as the juſtices at ſeſſions have heretofore directed the reparation of. And this they have a better and eaſier way of coming to the knowledge of than by a preſentment of a grand jury: So that the only matter neceſſary to be preſented is, that it is a publick bridge within the county, and out of repair; which is abſolutely neceſſary to be ſhewn in the order. When it is doubtful who ought to repair, the advice given by lord *Coke* in 2 *Inſt.* is certainly very good, that an inquiry ought to be made by the grand jury. 2 Inſt. 703.

The reſt of the court were of the ſame opinion; and therefore the order was affirmed. *Ex relatione alterius.*

Lockey and wife againſt *Dangerfield.*

S.C. 2 Stra. 1100.

*P 286

A Prohibition was prayed by Mr. *Robinſon* to a ſuit in the ſpiritual court, for calling a woman [bawd]: And he argued, that this is a defamation for which an action at common law will lie. *Raym.* 115. But ſuppoſing it to be a word of a mixt nature, a prohibition ought to go, becauſe otherwiſe the party may be twice puniſhed. 2 *Roll.* 295. *pl.* 3, 4. Beſides, this is a word only of heat and paſ-

An action does not lie for calling a woman a bawd; a prohibition therefore refuſed. Poſt. 376.

ſion, in which caſe the court always grants a prohibition. 1 *Sid.* 248.

On the other ſide it was argued by ſerjeant *Hayward*, that an action at common law does not lie for calling a perſon bawd, this being an offence properly cognizable in the ſpiritual court. *Cro. Car.* 229. S. C. 1 *Roll.* 44. *pl.* 9. *Cro. Car.* 110. 1 *Sid.* 438. S. C. 1 *Mod.* 31. *Salk.* 555. But ſuppoſing that this is a ſcandal puniſhable both in the temporal and ſpiritual courts, yet as a ſuit is already inſtituted in the ſpiritual court, the parties ought to be ſuffered to proceed therein. W. *Jones* 246.

Upon the argument of the caſe the court allowed, that if the calling a perſon bawd is actionable, this is a good ground for granting a prohibition; but of that they doubted, there ſeeming to be ſome diverſity in the books in relation to the point; and therefore they took time to adviſe. And after conſideration, it was ſaid by *Lee* C. J. that notwithſtanding the books cited for the prohibition, and 3 *Mod.* 74. (which is only a ſhort note of a caſe) it appears plain-
1 Lev. 140. ly by ſeveral authorities, particularly 1 *Roll.* 44. *pl.* 9. 1 *Sid.* 438. S. C. 1 *Vent.* 53. *Salk.* 553. that an action will not lie for this defamation: And the reaſon why the court denies a prohibition in this caſe is, that what is included in the deſcription of a bawd is not a temporal offence. And he cited the two fol-
(*a*) 1 Salk 382. 2 Ld. Ray. 1197. Fort 98. lowing caſes: **The Queen* and *Pierſon*, (*a*) *Trin.* 4 *A.* The defendant was indicted at *Hicks's hall*, for
* P 287 that ſhe was a common bawd, and procured men and women to meet together to commit fornication; and ſhe was found guilty, and judgment given againſt her. And a writ of error being brought thereon, it was objected, that the defendant ſhould have been charged with keeping a bawdy-houſe. And the

court

court held, that if the defendant had kept a room only for the purpoſe mentioned in the indictment, it would have been ſufficient; but it being no part of the charge, that ſhe kept a bawdy-houſe or room for that purpoſe, the indictment is not good, becauſe it contains only matter of ſpiritual cognizance. *Kirby and his wife* and *Savile*, (*b*) *Hil.* 3 *G.* 1. A prohibition was there prayed to a ſuit in the ſpiritual court for theſe very words, upon a ſuggeſtion that an action was brought for this in the *Marſhalſea-court*: But the court, after great conſideration, and having been attended by civilians, denied the prohibition, becauſe the matter is of eccleſiaſtical juriſdiction.

(*b*) 10 Mod. 384. Poſt. 300. 301.

In the principal caſe the prohibition was denied, *Ex relatione alterius.*

S.C. 2 Stra. 1102. by name of *Bertie* v. *Clutterbuck.*

Crow againſt *Maddock.*

Error to the *Exchequer Chamber* does not lie upon award of execution only.

A Writ of error having been brought, returnable before the juſtices and barons, upon an award of execution in a *ſcire facias ad revivend' judicium* in an action of debt on a bond, it was moved to quaſh the writ of error.

Againſt this it was now argued by Sir *Thomas Abney* and others, that a writ of error lies upon an award of execution: And if there be any error, it is examinable in the Exchequer chamber. So where an action of debt is brought on a judgment, error lies upon the judgment given in ſuch action. * P 288 Beſides, if no writ of error lies in *this caſe, the preſent application ought to have been made to the court of Chancery, out of which the writ iſſues.

On the other ſide it was admitted by ſolicitor general *Strange* and Mr. *Marſh*, that a writ of error lies upon an award of execution: But they inſiſted, that it cannot be brought in the Exchequer chamber, unleſs it be *tam in redditione judicii quam in adjudicatione executionis*; for a judgment not founded on the merits of the cauſe is not within the ſtatute of 27 *El. c.* 8. *Yelv.* 157. 1 *Vent.* 38. *Strode* and *Palmer*, *(a)* 3 G. 1. Error in the Exchequer chamber of a judgment upon a *mandamus*; and it was held, that it does not lie. And Mr. ſolicitor ſaid, that it has

(a) Lill. Ent. 248. Stra. 537.

has been alſo held, a writ of error does not lie in the Exchequer when the proceedings here are by original, becauſe there the cauſe begins in Chancery, and the words of the act are "firſt commenced, or "to be commenced there." On this ſide was alſo cited (as in point) *Hartop* and *Holt*, 5 *Mod.* 228. S. C. *Salk.* 263. S. C. *Comb.* 393. And as to the caſe in 2 *Keb.* 833. (which is to the contrary) that (it was ſaid) is but the ſingle opinion of lord *Hale*.

V. *Lloyd.* v. *Skutt.* Doug. 337. n. 3. Fitz-G. 67.

S. C. 1 Ld. Raym. 97.

And the whole court were clearly of opinion, and they ſaid, it is a ſettled point, that a writ of error does not lie in the Exchequer, upon an award of execution in a *ſcire facias* only; but the writ of error muſt alſo include the judgment in the former action, according to the caſe cited of *Hartop* and *Holt*.

The court therefore gave leave to the defendant in error to take out execution: Which, they ſaid, in this caſe is the proper motion.

*The King againſt *Bryan*.

*P 289

S.C. 2 Str. 1101.

A Conviction was made by a juſtice of peace, upon the ſtatute of 9 *G.* 2. *c.* 23. ſetting out, that *Mary Bryan*, being a ſeller and dealer in ſpirituous liquors, 10 *January*, 10 *G.* 2. did unlawfully ſell half a quarter of a pint of geneva, the ſame not being in any warehouſe, *&c.* and the ſaid *Bryan* having never taken out any licence for ſelling the ſame, againſt the form of the ſtatute; whereupon ſhe is adjudged to pay the penalty of ten pounds.

A Conviction on a ſtatute, need not negative an exemption contained in a proviſo.

And

And it was moved laſt term by Mr. *Taylor* to quaſh this conviction; (1) Becauſe a juſtice of peace hath no power by the ſtatute of convicting a perſon for ſelling ſpirituous liquors in a leſs quantity than two gallons, in a warehouſe not entred, or without licence; both theſe offences falling under the juriſdiction of the commiſſioners of exciſe, and being ſubject to an higher penalty than ten pounds. The only crime within the juriſdiction of a juſtice of peace, is that of hawking or ſelling ſpirituous liquors about the ſtreets, *&c.* but this conviction makes no mention of the place where the liquor was ſold, and ſeems wholly founded on the other offences. The penalty therefore ſhould have been not ten pounds, but one hundred pounds. (2) It ſhould have been ſhewn in the conviction, that the defendant is not within the exemption contained in the act; which poſſibly may be the caſe. This is neceſſary to be ſet out in convictions on the game-act; and though in that ſtatute the exemption is not contained under a proviſo, as it is in this act, yet the reaſon for ſhewing the exemption is the ſame in both caſes. As to the caſes in 1 *Sid.* 303. *Salk.* 521. they are different from the preſent, becauſe in thoſe the defendant might have pleaded his diſcharge; and ſo a conviction of a forcible entry (which is the caſe in 1 *Salk.* 353.) is traverſable; but otherwiſe it is here.

Poſt. 302. The *information* muſt negative the qualifications. *Rex* v. *Wheatman* Doug. 331. not the *evidence*. *Rex* v. *Crowther* 1 Term Rep. B. R. 125.

* P 290 *On the other ſide it was argued by ſolicitor general *Strange* and Mr. *Filmer*, (1) That in this caſe the juſtice of peace had a power of convicting; the clauſe for that purpoſe in the act being penned in the moſt general words poſſible, *ſcil.* "in any other manner whatſoever." And as to the objection to the penalty, Mr. ſolicitor cited *The King* and *Wyatt*, (*a*) *Eaſt.* 13 *Geo.* 1. and *The King* and *Wycker*, (*b*) *Mich.* 1 *G.* 2. Each of theſe caſes was a conviction for

(*a*) 2 Ld. Ray. 1478. 1 Seſſ. Caſ. 374.
(*b*) 1 Seſſ. Caſ. 376.

for keeping two greyhounds, for which the defendant was adjudged to pay 5s. And it was objected, that this is two offences, for which there ſhould have been two penalties: But the exception was over-ruled. (2) If the defendant was a perſon exempted, ſhe might and ought to have inſiſted on it in her defence before the juſtice. And the difference is, that where the exemption is in the body of a penal clauſe, there it muſt be ſhewn; but otherwiſe it is where it is contained under a proviſo. 1 *Lev.* 26. S. C. 1 *Keb.* 20. *The King* and *Theed*, *(c) Mich.* 11 *G.* 1. Beſides, here are the words, "contrary "to the form of the ſtatute;" which cannot be true if the defendant is within the exemption.

V. 1 Term Rep. B. R. 144.

(c) Stra. 608. 2 Ld. Ray. 1375.

For theſe reaſons (which the court agreed to *in omnibus*) the objections were over-ruled. And *Lee* C. J. cited *Jones* and *Axen*, *(d) Mich.* 8 *W.* 3. and *The King* and *Theed*, which, he ſaid, was thus: The defendant was convicted for not permitting the officers of exciſe to weigh his candles: And it being only ſaid in the conviction, that they "lawfully entered," it was objected, that it ſhould have been ſhewn, whether it was by day or night: But the court held, that if the entry was by night, the defendant ought to have ſhewn it; and it being ſet out that they "lawfully entered," it was well enough.

(d) 1 Ld. Ray. 119.

In the principal caſe the conviction was therefore confirmed.

Garland

* P 291

*Garland qui tam, &c. againſt *Burton.*

S. C. Ante 27. 174.

An information for non-reſidence need not alledge that the defendant was inſtituted and inducted. Objection that the defendant was deſcribed "parſon or "vicar" over-ruled. Such information does not lie before juſtices of *oyer* and *terminer* at the aſſiſes. See ante S. C. 27. 28. n. V. *Bevan* v. *Williams*, 3 Term Rep. B. R. 635. n. S. P.

INFORMATION *qui tam* by *C. G.* clerk of aſſiſe, againſt the defendant, upon the ſtatute of 21 *H.* 8. *c.* 13. *(ſ.* 26.*)* for non-reſidence: And it alledged, that he being a ſpiritual perſon, and parſon or vicar of the pariſh-church of *C.* in the county of *H.* for four whole months next before, *&c.* did not keep his abiding, *&c.* And this information being removed hither by *certiorari*, the defendant demurs.

And it was ſhewn for cauſe of demurrer by Mr. *Bootle*, (1) That it is not alledged in the information, that the defendant was inſtituted and inducted into this church; as it ought to be in this caſe, it being a proſecution for a penalty. And ſo it is ſtated in *Cro. Car.* 146. *ſed non allocatur.* And *Chapple* juſt. ſaid, that though this may be neceſſary to be ſhewn where the pleading is on the part of the defendant, it is otherwiſe where the matter comes on the ſide of a plaintiff. And he cited *Salk.* 355.

(2) It was objected, that this information ought not to be in the disjunctive; and the words are, "parſon or vicar;" *ſed non allocatur.* For (as *Lee* C. J. ſaid) the act extends to both. And by *Chapple* juſt.) the words here are ſynonymous.

(3) It was urged, (and this was the objection principally relied upon) that this information does not lie before juſtices of *oyer* and *terminer* at the aſſiſes,

aſſiſes, becauſe there the parties cannot caſt an eſſoin, or have wager of law or protection allowed, which this ſtatute expreſly mentions. *Farrington's* caſe, *Cro. Car.* 112. S. C. *Hetl.* 101. *Cro. Car.* 146. *W. Jones* 193.

In anſwer to this objection it was argued by ſolicitor general *Strange*, that the aſſiſes being holden before the *ſame judges who ſit in *Weſtminſter-hall*, they may properly fall within the words, "the King's courts." And it hath often been determined, that the aſſiſes have juriſdiction in caſes where the ſtatute ouſts eſſoin, *&c.* as in informations upon 5, 6 *E.* 6. *c.* 14. for ſelling cattle alive. *King* and *Gawll*, *Salk.* 372. *King* and *Hicks*, *ibid.* *Farthing qui tam* and *Martyr*, *(a)* *Mich.* 13 *G.* 1. in this court. Action on the ſtatute of *H.* 8. for non-reſidence; and it was moved in arreſt of judgment, that the action ought to have been brought in the county where the cauſe of action aroſe; and for this reaſon the judgment was arreſted. Indeed, if the act upon which the preſent information is brought had given the defendant an eſſoin, *&c.* he might reaſonably have objected to the bringing it at the aſſiſes, becauſe there he could not have it; but as no eſſoin, *&c.* is by this act allowed, it is quite immaterial where the information is brought.

* P 292

(a) Ante 28.

But the whole court were clearly of opinion, for the reaſon, and upon the authorities that were mentioned on the part of the defendant, that this information is not well brought: And they alſo cited *Farrington's* caſe, (as it is repored in) *Hutt.* 98. *Raym.* 394. 2 *Hale's Hiſt. P. C.* 30. *Meſſenger* and *Robſon*, *(b)* *Mich.* 6 *G.* 2. *in C. B.* Information upon the ſtatutes of 8 *El.* *c.* 11. and 1 *J.* 1. *c.* 17. for exerciſing the trade of a feltmonger, without having ſerved an apprenticeſhip thereto for ſeven years.

(b) Ante 27, 28. 1 Ld. Raym. 373.

And

And it was moved in arreſt of judgment, that the information was not brought in the county where the cauſe of action aroſe, according to the ſtatute of 21 *Jac.* 1. and ſeveral caſes were thereupon cited: And there was a rule to ſhew cauſe. And *Eyre* C. J. there ſaid, that the ſeſſions had no juriſdiction, and that if the plaintiff could not proceed in the ſuperior courts, he would be without remedy: And he diſtinguiſhed it from the caſes of *The King* and *Gawll*, and *The King* and *Hicks*. And *Lee* C. J. and *Chapple* juſt. now ſaid, that in *The King* and *Gawll* there was never any determination, the matter being compromiſed: And in *Farthing* and *Martyr* there was only a rule to ſhew cauſe: for *one of the parties dying, no cauſe was ever ſhewn. And (by *Chapple* juſt.) the caſes of *Gawll* and *Hicks* do not affect the preſent caſe, becauſe thoſe are founded on a ſtatute, which gives authority to juſtices of peace at the quarter-ſeſſions to determine all offences done contrary thereto.

1 Ld. Ray. 373.

* P 293

Judgment therefore, upon this point, for the defendant *Ex relatione alterius.*

The

The King againſt *Blunt.*

QUO *warranto* againſt the defendant for uſurping the office of one of the jurats of the corporation of *Maidſtone* in the county of *Kent*: And the caſe upon the pleadings, which were prolix as to the main point, was in ſubſtance this:

A charter reciting that by a former charter the power of electing jurats was in the "mayor, jurats and commonalty;" whereas it ſhould be "mayor and jurats" only, declares that it ſhall and may be lawful to and for the mayor, jurats and commonalty to chuſe jurats out of the commonalty at large. It operates as a new grant, and the miſrecital does not vitiate the charter.

By letters patent of *Edw.* 6. the town of *Maidſtone* was incorporated by the name of mayor, jurats and commonalty; and it was thereby granted, that the mayor and jurats, or the major part of them, ſhall chuſe jurats out of the inhabitants at large, who are to continue jurats for life, if the mayor, jurats and commonalty ſhall think fit; and a power of amotion of the jurats is given to the mayor, jurats and commonalty, in which caſe the ſaid mayor, jurats and commonalty, are to chuſe new jurats.

Queen *Elizabeth* granted a charter in like manner.

And by letters patent of 2 *J.* 1. it was granted, that the mayor and jurats ſhall chuſe jurats out of the freemen only.

Afterwards by a charter granted 17 *J.* 1. reciting, that by the charter of Queen *Eliz.* the mayor, jurats and commonalty, (whereas it ſhould have been ſaid, "mayor and *"jurats" only) might chuſe jurats out of the inhabitants; and that by the charter of 2 *Jac.* 1. the mayor, jurats and commonalty, might chuſe jurats out of the freemen only, therefore to prevent all doubts, &c. it is ordained, "that it ſhall and may

"be

" be lawful to and for the mayor, jurats and com-
" monalty, to chuſe jurats out of the inhabitants,"
" at large."

And the only material queſtion upon demurrer was, whether, upon the conſtruction of this laſt charter, it be neceſſary for the commonalty to concur with the mayor and jurats in the election of a jurat in the caſe of death; the defendant's election appearing to be by the mayor and jurats only.

And it was argued laſt term by ſerjeant *Eyre* for the defendant, that the only point referred to in the laſt charter, being the qualifications of the perſons to be elected, it ought not to be conſtrued in ſuch a manner as to make any alteration with reſpect to the electors, becauſe this is contrary to the intent of the King. *Englefield's* caſe, 7 *Co.* 14. *Foſter's* caſe, 11 *Co.* 62. *a. b.* 1 *Vent.* 246. And though the words (mayor, jurats and commonalty) are mentioned in the recital, yet this being the corporate ſtyle, they are to be underſtood to mean only the corporation, becauſe this is agreeable to truth; and the mayor, jurats and commonalty, are to concur in electing jurats, by the firſt charter, in the caſe of amotion. But on the contrary, by putting ſuch a conſtruction on the words as will make a miſrecital, the grant itſelf will be annulled. *Legat's* caſe, 10 *Co.* 109. *Earl of Rutland's* caſe, 8 *Co.* 55. Earl of *Cumberland's* caſe, 1 *Co.* 167. *Abbot of Waltham's* caſe, cited in both thoſe caſes.

On the other ſide it was argued by ſerjeant *Draper*. And he objected, that by all the charters the election is directed to be " at ſome convenient place " within the town or pariſh;" and in the defen-
* P 295 dant's plea it is ſaid *that he was elected " at the town-hall of the " town or pariſh," which poſſibly may be out of the town or pariſh: So that the defendant has not ſhewn a good title.

This

This term the caſe was again argued by Sir *Thomas Abney* on the one ſide, and Mr. *Deniſon* on the other. And the whole court (without ſaying any thing in relation to the objection to the plea) was of opinion, that upon conſtruction of the laſt charter, the right of election is in the mayor, jurats and commonalty. For (as *Lee* C. J. ſaid) the words, "it ſhall and may be lawful, *&c.*" are expreſs words of grant; and therefore this charter muſt operate as a new grant. And ſuppoſing the King to be here deceived in the reciting part, yet as the words of grant are ſufficient to ſhew his intention, the miſrecital will not vitiate the charter, eſpecially as it is not the falſe ſuggeſtion of the party, nor part of the conſideration. And the chief juſtice cited lord *Chandos*'s caſe, 6 *Co.* 55. *b. Carth.* 350. *King* and *the biſhop of Cheſter*, *(a)* *Hil.* 9 *W.* 3.

Judgment for the King.

(a) Skin. 651. 2 Salk. 560. 1 Ld. Ray. 292. Show. P. C. 212.

The King againſt *Maſſory*.

THIS caſe was the ſame with the preceding, with this difference only, that in this the defendant ſets out his election to be according to the charter of 2 *J.* 1. which directs, that the mayor and jurats ſhall chuſe jurats out of the freemen; to which the coroner replies, and ſets out the charter of 17 *J.* 1. whereby the mayor, jurats and commonalty, are to chuſe jurats out of the inhabitants.

By one charter, jurats are to be choſen by the mayor and jurats, out of the freemen; but by a ſubſequent charter, they are to be choſen by the mayor, jurats and commonalty, out of the inhabitants; An election of a jurat according to the former charter is bad.

And

And it was argued laſt term by ſerjeant *Eyre* for the defendant, that both theſe charters are conſiſtent; for the mayor and jurats may have a right of * P 296 chuſing *jurats out of the freemen; and it may alſo be neceſſary for the commonalty to concur in an election out of the inhabitants.

Sed non allocatur. And judgment was now given for the crown.

Keate and another againſt *Watſon.*

Bringing a writ of error is a waiver of irregularity in entering the judgment.

MOTION to ſet aſide a judgment for irregularity. And on the report of the maſter, the caſe appeared to be this:

The plaintiff obtained a verdict in *Eaſter* term, and after entring rules, not upon the *poſtea*, but in the place where the rules to plead are entred, he ſigned judgment, 18 *October* following. Afterwards the defendant took out a rule to be preſent on the taxation of coſts, and alſo brought a writ of error; and before the taxation of coſts the plaintiff died.

And it was inſiſted by Mr. *Marſh* and others, that this judgment was irregularly ſigned.

But *per curiam*, the bringing of a writ of error admits a judgment, and is a waiver of the irregularity. And therefore they denied the motion.

And ſerjeant *Draper* (who was counſel againſt the motion) ſaid, that the taking out a rule to be preſent at the taxation of coſts, is alſo a waiver of all irregularities; and he cited a caſe where it was ſo determined. But of this point the court now gave no opinion.

Hutchin

Hutchins againſt *Hutchins.*

* P 297

MOTION by Mr. *Ford* to ſet aſide an award, becauſe it appeared on the face of it not to be final or mutual, and for other defects appearing on the award. And he argued, that the court exerciſes a diſcretionary power in granting attachments for not complying with awards. As where an action is brought on an award, the court has refuſed an attachment; and yet there is no exception in the ſtatute. And in the caſe of *Cowell* and *Walter*, *(a)* (about three or four years ſince) an attachment was refuſed, becauſe it appeared that the arbitrators had choſen an umpire after the time appointed. And if an award is null, as this appears to be, it falls within the intent of the act; which, as appears from the caſes before mentioned, ought to receive an equitable conſtruction.

The court will not ſet aſide an award for defects appearing thereon, but only for fraud or corruption in the arbitrators. Poſt. 299. 9, 10 W. 3. c. 15.

(a) Cowell v. *Walter* 2 Kely. 66. 70. 2 Barn. 154.

But *per curiam*, an award cannot be ſet aſide, unleſs it be for fraud or corruption in the arbitrators, becauſe to theſe caſes only the ſtatute extends. To which point *Page* juſt. cited *Hardeſs* and *Morris*. And *Lee* C. J. ſaid, he remembered this diſtinction to be made by Mr. juſtice *Powell*; that the court will not ſet aſide an award for defects appearing on the face of it, but this is a good reaſon againſt granting an attachment for refuſing to perform it. The motion was therefore denied.

Thruſtout,

S. C. 28tra. 1099. not S. P.

Thruſtout, on the demiſe of Park and his wife, againſt *Troubleſome.*

Proceedings ſtaid in a ſubſequent ejectment, pending a former ejectment brought for the ſame lands, on the ſame title.

MOTION to ſtay proceedings in an ejectment brought in this court, until the plaintiff has diſcontinued another ejectment brought before the preſent action on the ſame title, and for the ſame lands, in the Common Pleas.

*And it was ſaid by ſolicitor general *Strange* and others, in ſupport of the motion, that this has been frequently done, particularly in the late caſe of *Dormer* and *Parkhurſt*, (a) where *Dormer* brought another ejectment, pending the ſpecial verdict in a former ejectment; and he was ſtayed from proceeding in the new ejectment till the verdict ſhould be determined.

* P 298

(a) Ante 125. 137. n.

And *per curiam*, the preſent application is very reaſonable, in order to prevent vexation: And they cited *Salk.* 255, 258. which is contrary to 1 *Sid.* 279. And *Chapple* juſt. ſaid, the reaſon of ſtaying proceedings in one ejectment where another is brought, is, becauſe the firſt cannot be pleaded in bar of the other.

The rule therefore to ſhew cauſe for ſtaying the proceedings (which was oppoſed by Mr. *Ketelby*) was now made abſolute.

Farrell's

Farrell's case.

A perſon committed for a groſs contempt, cannot be bailed the day after the commitment, though the proſecutor conſent.

MR. *Farrell*, an attorney, having been committed for a groſs contempt of the court, *viz.* for extorting, by menaces, a bill of ſale from a perſon in cuſtody, it was moved by Mr. *Marſh*, the day after the commitment, (being the laſt day of term) that he may be bailed. And he argued, that the commitment is not in the nature of puniſhment, but in order to enforce the party to anſwer on interrogatories, who may purge himſelf thereupon. And he mentioned the caſe of one *Willis* an attorney, who was bailed the day after his commitment for a contempt.

But the court ſaid, the commitment is now to be conſidered as a puniſhment: And therefore though the proſecutor conſented to the party's being bailed, the court refuſed to bail him, in order to preſerve the dignity of the *court: But they gave him leave to apply to a judge at his chamber in the vacation for that purpoſe.

1 Barnard. B. R. 371, 372.

*P 299

A party having brought an action upon an award, cannot have an attachment for non-performance of it, without diſcontinuing the action.

AN attachment was prayed for non-performance of an award. Againſt which it was objected, that an action of debt has been already brought in the Common Pleas on the ſame award. And alſo that the arbitrators have miſbehaved themſelves. It was replied by ſolicitor general *Strange* and others, that in theſe caſes the party may proceed both ways, and the court will only take care that he do not receive a double ſatisfaction. *Salk.* 73.

And *per curiam*, though a miſbehaviour in the arbitrators is a good reaſon for moving to ſet aſide an award, it is not proper to ſhew it for cauſe againſt an attachment. But (for the other matter) *Lee* C. J. ſaid, he believed it had been determined, that after the party had made his election by bringing an action, the court ought not to grant an attachment. And the court would grant no other rule in the principal caſe than a rule for an attachment, on the plaintiff's undertaking to diſcontinue his action.

Ante 297.

S. P. *Stock* v. *Huggens*, Caſ. T. Hardw. 106.

Hinds againſt *Thompſon*.

Where a prohibition is applied for to a ſuit in the ſpiritual court for calling a woman, *whore*, on the ground of its being actionable by cuſtom in a certain place; it muſt appear *by affidavit* that there is ſuch cuſtom there, and alſo that the words were ſpoken within the local limits of it.

MOTION by Mr. *Filmer* for a prohibition to a ſuit in the ſpiritual court, for calling a woman whore; upon a ſuggeſtion that a woman lived in the pariſh of St. *Auguſtine* in *Briſtol*, or in ſome publick place in or near the neighbourhood thereof; and that there is a cuſtom, that whores and lewd women are puniſhable in the courts of common law at *Briſtol*, and alſo that the calling women whores or lewd women is puniſhable in the common law courts there. And an affidavit was produced of the cuſtom.

It

*It was objected by Mr. *Denison*, that these words being of a spiritual nature, the custom and matter here suggested ought to have been pleaded below, where perhaps it would have been admitted, and then there would be no need of applying for a prohibition: But if it was denied, the court would grant a prohibition, because then it would appear not to be triable there. 1 *Vent.* 10. 2 *Salk.* 551. But supposing that it is not necessary to plead this below, it ought (at least) to be verified by affidavit; whereas here the affidavit is only of the custom, without shewing that the words were spoken in *Bristol*, and that the woman lived there; which last circumstances do not sufficiently appear even by the suggestion. 2 *Salk.* 549. *Saville* and *Kirby*, (*a*) *Hil.* 3 G. 1. A prohibition was there prayed to a suit in the spiritual court for calling a woman bawd, upon the suggestion of such a custom as the present; to which it was objected, that there was no affidavit of the custom, and of the words being spoken in the place: And the motion was denied. *P 300 (*a*) 10 Mo. 384. Ante 287. Post 301.

To this it was replied (amongst other things) by Mr. *Filmer*, that where a prohibition is prayed to a libel for such words spoken in *London*, it is only on a suggestion of the custom, and that the words were spoken, and that the party lived there; and there is no instance of any affidavit being produced. (And so Mr. *Moreton*, one of the city counsel, said, was the practice.) And Mr. *Filmer* cited *Cook* and *Wingfield*, (*b*) *Pas.* 9 G. 1. Motion for a prohibition to a suit for words spoken in *London*; but it being after sentence, the prohibition was refused, because the court said, they could not take notice of the custom: But they admitted, that if a prohibition had been prayed before sentence, a suggestion would have been sufficient. (*b*) Stra. 555. Fort. 347.

Lee C. J. The rule is, that where a prohibition is prayed, for a matter not appearing on the face of the proceedings to be out of the jurisdiction of the
* P 301 court below, *it is necessary not only to suggest, but also to verify it by affidavit. 1 *Salk.* 549, 551. And this seems highly reasonable, because otherwise there may be a prohibition in every case. In *Saville* and *Kirby* there was a suggestion, that in *Westminster*, where the words were spoken, the offence was punishable in the temporal courts there; but that was not by custom, but by act of parliament, which act was produced: But because it was not suggested, the court took no notice thereof. And the reason of granting the prohibition there was, because an action was brought before in the *Marshalsea* for the same cause.

V. Ante 7, 8. post 304. The rest of the court concurred in opinion, that there ought to be an affidavit of the words being spoken in *B.* and for want hereof, they denied the prohibition. And C. J. said, he believed, that where prohibitions are prayed to suits for such words spoken in *London*, the practice always is to produce an affidavit.

The

The King againſt *Dore.*

CONVICTION upon the ſtatute of 3 *W.* & *M.* *c.* 10. againſt deer-ſtealing: And the conviction ſet forth, that 30 *May* 1738. one *T. B.* informed lord *D.* being a juſtice of peace, &c. that defendant 9 *May*, &c. in a certain foreſt of the King called *New foreſt*, killed, took and carried away one red deer, &c. without the conſent of the King, or the keeper of the ſaid foreſt: And it alſo ſet out, that one *W. S.* on the 10th of the ſame *May*, ſaw a red deer in the cuſtody of defendant, and the defendant owned to him that he on the "day then before" unlawfully hunted and killed the deer then in his cuſtody, &c.

A man may be convicted of deer-ſtealing upon his confeſſion to a witneſs, who depoſes it before the juſtice. Though it does not appear that he confeſſed the killing the deer mentioned in the information. Q.

And it was moved by Mr. *Filmer* to quaſh this conviction; (1) Becauſe it is founded on a confeſſion of the defendant made only to the witneſs; whereas by the ſtatute, the evidence ought to be "by the "confeſſion of the party, or by the oath of one or "more credible witneſs *or witneſſes, before one or "more juſtices:" So that the confeſſion is not ſufficient, unleſs it be made before the juſtice. (2) It is uncertain whether the deer, for the killing of which the defendant is convicted, be the ſame deer, for the killing of which he is informed againſt: For the words (on the day then before) may be underſtood, not only of the day next before, but alſo of any other day before the 10th of *May*.

* P 302

On

On the other ſide it was argued by ſolicitor general *Strange*, and ſo reſolved by the court, (1) That though the confeſſion mentioned in the act, and there oppoſed to the oath of the witneſs, muſt be before the juſtice; yet whatever the party hath owned to the witneſs, he may properly depoſe, and this is good evidence to ground a conviction upon, as by the oath of a witneſs. And *Probyn* juſt. remembered a caſe, where the oaths of two witneſſes were required by act of parliament, and there the confeſſion of the party before two perſons, and atteſted by them, was held ſufficient. (2) Though what is ſtated by way of evidence does not ſufficiently ſhew that the defendant killed the ſame deer which is mentioned in the information, yet it fully ſhews that he killed the deer then in his cuſtody, for which alone he might be convicted: And the words (then before) are to be underſtood according to common parlance, and to mean the day next before. The conviction was therefore confirmed. *Ex relatione alterius.*

N. By 16 *Geo.* 3. *c.* 30. the former acts relating to deer-ſtealing are repealed.

The King againſt *Towning and others.*

Demurrer to indictment for having nets and guns for killing hares allowed.

1. J. 1. *c.* 27. *ſ.* 3. Ante 289.

INDICTMENT againſt the defendants for having in their cuſtody eight nets and two guns for catching hares, *&c.* to which the defendants demur. And it was objected by Mr. *Deniſon*, (1) That it doth not appear in this indictment that the defendants were not qualified perſons; and in the caſe of *The King* and *Bryan*, the other day, the *court ſeemed to be of opinion, that this is neceſſary to be

* P 303

ſhewn

ſhewn in proceedings on the game-laws. (2) The matter here charged is not indictable, as this is no offence at common law, and an indictment is not a remedy preſcribed by the ſtatutes relating to this ſubject. 1 *Show.* 398. *Salk.* 45, 460. *King* and *Sterne*, *Hil.* 4 *G* 1. In that caſe this exception was taken, by ſerjeant *Whitaker*, to an indictment for catching an hare. (3) In the caption of this indictment it is not ſaid, that it was "then and there ſworn."

S. P. *Rex* v. *Buck*, Stra. 679. This third objection was overruled in 1 Ld. Ray. 548.

And no counſel appearing on the other ſide, judgment was immediately given for the defendant.

Mr. *Deniſon* at the ſame time took the ſame exceptions as above to the caption of another indictment againſt the ſame defendants: And he alſo objected, that it does not appear to what time the ſeſſions were adjourned. And judgment was there given for the defendants, no counſel appearing on the other ſide. *Ex relatione alterius.*

Hilary

*P 304 *Hilary Term,

12 Geo. II. 1738.

Sir *William Lee*, Chief Juſtice.

Sir *Francis Page*,
Sir *Edmund Probyn*, } Juſtices.
Sir *William Chapple*,

Driver againſt *Driver*.

The cuſtom of *London* whereby it is actionable to call a woman *whore*, muſt appear by affidavit, in order to ground a motion for a prohibition, V. Ante 7, 8. and the caſes there referred to.

MOTION by Mr. *Robinſon* to make a rule abſolute for a prohibition to the ſpiritual court, to ſtay proceedings there upon a libel for calling a woman whore in *London*; upon a ſuggeſtion only of the cuſtom, that ſuch defamation in *L.* is puniſhable in the temporal courts.

But

But *per curiam*, there must be either a plea or an affidavit of the custom; for without one of these there is no foundation for the court to proceed upon; as we cannot take judicial notice of the customs of *London*. And accordingly in a late case, where a prohibition was prayed to a libel for the same words spoken in *Bristol*, [where there is the like custom] an affidavit thereof was insisted on. And *Probyn* just. said, there is no difference between the customs of *London* and *Bristol*, unless it be that the customs of the first are confirmed by act of parliament. *Hinds. v. Thompson*, Ante 299.

*Solicitor general *Strange*, *ut amicus curiæ*, said, that there was a case [the name of which he believed to be *Argyle* and *Hunt*] *(a)* where this very point was litigated, and the court was of the same opinion as has been now delivered: But there the objection was not taken till after sentence, and consequently too late, because no objection, *dehors* the libel, can be taken after sentence. * P 305

(a) Stra. 187. Fort. 347.

In the principal case therefore the court denied the motion, though no counsel appeared against it.

Carpenter

Carpenter againſt *Davis.*

The defendant, an executrix, allowed to amend her plea of a retainer, by adding *profert* of the letters teſtamentary, after joinder in demurrer and the cauſe ſet down to be argued.

ACTION againſt an executrix; to which ſhe pleaded a retainer: And after a general demurrer, and joinder therein, and after the cauſe was ſet down in the paper, it was moved (laſt term) by ſerjeant *Draper*, for leave to amend the defendant's plea, by adding a *profert in curia* of the letters teſtamentary, in order to ſhew that ſhe was a lawful executrix. And he produced the probate of the will; and founded his motion upon the ſtatutes of 27 *El. c.* 5. and 4 *A. c.* 16. *(ſ.* 1.)

On the other ſide it was now argued by ſerjeant *Agar*, that as by this amendment the defendant will make a new title, and the whole roll will be altered from the beginning to the end, this is not a caſe within either of theſe ſtatutes; the firſt of which only mentions imperfections, defects, or wants of form; neither of which this is. And by means of this ill plea, to which the plaintiff was obliged to demur, an aſſiſes hath been loſt.

But *per Probyn* juſt. there are many inſtances of amendment after the cauſe has been put in the paper. And the probate being here produced, it will be according to the honeſty of the cauſe to ſuffer this amendment. And it *was obſerved by him and *Chapple* juſt. that the words of the act of Queen *Anne* are very ſtrong, *viz.* "No advantage or exception

* P 306

"ſhall

" ſhall be taken of or for ——— the default of al-
" ledging of the bringing into court letters teſtamen-
" tary, *&c.*" which are much ſtronger than if it had been ſaid, that this default ſhall be amended.

The court therefore (*Lee* C. J. *abſente*) granted the amendment, on the defendant's paying coſts.

Note; Laſt term this cauſe was called on in the paper, but ſerjeant *Draper*, who was counſel for the defendant, then ſaid, that he was not ready; whereupon the cauſe was adjourned; ſerjeant *Agar*, on the other ſide, mentioning his objections, and (amongſt the reſt) the want of a *profert*. And immediately after ſerjeant *Draper* made the above motion.

Langley againſt *Blackerby*.

MOTION that the plaintiff may be admitted to proceed *in forma pauperis*, in his action commenced againſt the defendant, upon the uſual affidavit. Againſt which it was urged by Mr. *Benny*, that he hath proceeded as far as a rejoinder, without having made ſuch application, and therefore ought not now to be admitted as a pauper.

Plaintiff may be allowed to ſue *in formâ pauperis*, at any ſtage of the cauſe.

But *per curiam*, as the judges are impowered by 11 *H.* 7. *c.* 12. to admit perſons to ſue *in forma pauperis* in the beginning of a proſecution, they have a power thereby implicitly given them of doing it at any time afterwards. And therefore they granted the motion.

Stat. 23 H. 8. c. 15.

The

* P 307

S. C. Bur. S. C. 122.

*The King against the inhabitants of Norton.

The maiden settlement of a married woman is *suspended*; and she cannot be removed under it, during the coverture.

MOTION by Sir *Thomas Abney* to quash an order of two justices for the removal of *Ellen Burmingham* from *Stretford* to *Norton*, and also an order of sessions confirming the same. And the principal and only objection upon which the court below gave any opinion was, that it doth not appear the husband of the pauper is dead. And he argued, that it being stated only, that "the husband was a native "of *Ireland*, and left his wife, and went abroad, "several years ago, and hath continued so ever since, "and where he now is or resides they know not," he may, for aught appears to the contrary, be alive: And if so, the wife cannot be sent to *Norton*, where it is said in the order her settlement was "at and be-"fore her intermarriage." And Sir *Thomas* cited the following cases: *The parishes of Fawwick* and of *Marson*, (a) *Trin.* 1 *Geo.* 1. It was there declared by the chief justice, that the settlement of a woman, who marries a vagrant, is suspended during the coverture; and that as the husband cannot be sent to the place of the wife's settlement, so neither can the wife herself, because a husband and wife cannot be parted. *The parishes of Shadwell* and *of St. John in Wapping*, (b) *Trin.* 9 *G.* 1. One *Ridley* a vagrant, having no settlement, married a woman who had a settlement in *St. John's Wapping*, and had four children by her born

(a) Called *Hanwey* v. *Marston*. Bur. S. C. 123. *Qu.* 19 Viner. 410.

(b) Bur. S. C. 124.

born in *Stepney*. And it was held, that the children were not ſettled in the place where they were born, but where the wife had a ſettlement; but that this was ſuſpended during the coverture, and it revived again upon the death of the huſband.

On the other ſide it was argued by Mr. *Deniſon*, that ſufficient matter is ſtated in the ſeſſions order to ſhew the huſband is dead; and it has been determined, that if a woman marries a man who never had a legal ſettlement, *after her huſband's death ſhe may be ſent to the place of her laſt ſettlement, and ſo may alſo the children of the marriage. The only reaſon wherefore a woman cannot be ſent to the place of her ſettlement in the life-time of the huſband is, becauſe the huſband and wife cannot be ſeparated; but this cannot happen here, becauſe it appears, that ſuppoſing the huſband to be alive, he is at leaſt abſent. The queſtion therefore is, where the woman is to be ſent. Now the act of removals directs, that perſons ſhall be ſent to the place of their laſt legal ſettlement: And there is no ſuch thing as the ſuſpenſion of a ſettlement. If a man marries a woman who has a freehold or leaſehold eſtate, the huſband and wife cannot be removed from the place where the lands lie. To which laſt point the court agreed, becauſe it is the eſtate of the huſband.

* P 308

But the court was unanimouſly and clearly of opinion, that this order is ill, becauſe it does not appear that the huſband is dead; but rather the contrary, it being ſtated, that where he is or reſides they know not. For if the huſband has no ſettlement, the wife cannot be ſent any where, becauſe they are but one perſon, and it is againſt the law of nature to ſeparate them; and if juſtices of peace had ſuch power, they would have in effect the power of divorcing. For this reaſon the wife's ſettlement during

See *Rex* v. *Carleton*, Bur. S. C. 813.—*St. Michael* v. *Nunny*, Stra. 544. Bur. S. C. 290.

ing

ing the coverture is ſuſpended; but after the huſband's death, both ſhe and her children may be ſent to the place where ſhe was laſt ſettled: And ſo it has been determined.

Both the orders were therefore quaſhed.

It has been ſince determined that the maiden ſettlement is not ſuſpended by marriage. *Rex.* v. St. *Botolph's.* Bur. S. C. 367. Sayer, 198. V. Cald. 39. 206. 236. 371.

Deakin againſt *Cartwright.*

The Plaintiff ſigned judgment after the term, took out a *Ca' Sa'* teſted the firſt and returnable the laſt day of the ſame term, and alſo a *teſtatum capias* teſted the laſt day of that term and returnable on the firſt day of the next term; this held to be regular. (*a*) Ante 54 and reſerences there. (*b*) 8 Mod. 310.

THIS cauſe was tried in *London* at the laſt ſitting in *Michaelmas* term laſt, being the day before the end of the term, upon a *diſtringas* returnable the laſt day thereof. *The plaintiff ſigned judgment after the term, and took out a *cap. ad ſatisfaciend,'* teſted the firſt, and returnable the laſt day of the ſame term, and alſo a *teſtatum capias*, teſted the laſt day of that term, and returnable the firſt day of the preſent.

And it was moved by ſerjeant *Agar* to ſet aſide this *teſtatum capias*, as not being warranted by the judgment.

Againſt which it was argued by Mr. *Filmer*, that this is a judgment of *Michaelmas* term, and relates to the firſt day thereof: And ſo it was held in *Fuller* and *Jocelyn*, (*a*) the executor of lady *Twiſden*; which was of a judgment entered up on a warrant of attorney. And he alſo cited the two following caſes, *Greaves* and *King* (*b*) *Mich.* 11 *Geo.* 1. There the judgment was ſigned 14 *February* 1722. and the execution was teſted 12 *February* 1723. and the queſtion

was,

was, whether the execution was regular, there being no *ſcire facias* to revive the judgment: And the court was of opinion, that the judgment related to the firſt day of the term, and conſequently there was more than a year between the judgment and execution: But two of the judges held, that it would be hard to ſet aſide the execution, becauſe it was taken out after the year by relation only, and nothing appears to have been done afterwards in the caſe. *Millar* and *Bradley*, (*c*) *Mich.* 10 *G.* 1. Error of a judgment in *C. B.* and it was affirmed here the laſt paper-day in *Trinity* term: The judgment was ſigned the laſt day of the term, and the *cap. ad ſatiſ.* was teſted the ſame day. And upon motion to ſet aſide the execution, it was held to be well warranted, for that the judgment relates to the firſt day of the term.

(*c*) 8 Mod. 189.

' in the principal caſe it was held clearly by the court, (*Chapple* juſt. *abſente*) that this execu- well ſued out. For all judgments ſigned in :ation, before the eſſoin-day of the ſubſequent are judgments of the preceding term, and re-) the firſt day thereof: And the term being con- * P 310 d but as one day in *law, the party may take :ecution teſted at any time in the ſame term of the judgment is. And *Lee* C. J. cited a caſe, h, he ſaid, is much ſtronger than the preſent) een *Sir John Parſons* and *Gill*, (*d*) *Mich.* 13 . *in B. R.* Judgment was there ſigned between y and *Eaſter* term, and in the ſame vacation the idant died; and after his death a *fieri facias* was n out, teſted the firſt day of *Hilary* term; and goods of the deceaſed in the hands of his execu- were taken thereupon. And the court held, as to the party againſt whom the judgment was, goods were bound as from the teſte of the execution;

(*d*) 1 Ld. Ray. 895. Comyn's Rep. 117.

tion; though it was otherwiſe as againſt purchaſers by act of parliament, and conſequently the execution was regular.

Motion therefore denied.

After the court had delivered their reſolution, ſerjeant *Agar* ſaid, that there was a caſe between *Holden* and *Sir John Stanhope* exactly agreeable thereto.

S. C. 2 Stra. 1107.

The King againſt *Pierſon and others.*

Information granted againſt all perſons concerned in inveigling a young lady, a ward of Chancery about 16 years of age, to marry a man much beneath her. Though the Court of Chancery had puniſhed them for the contempt. V. *Rex.* v. *Thorp.* 5 Mod. 221. Comyn's Rep. 27. *Reg.* v. *Blacket.* 7. Mod. 39.

MOTION by ſolicitor general *Strange* for an information againſt one *Pierſon*, lord *Offuſtone*, and ſeveral other perſons, upon the following caſe: The ſaid *Pierſon*, who was the eldeſt ſon of one of the ſtewards of the earl of *Tankerville*, and in low circumſtances, but related to the *Tankerville* family, by divers inſinuations and practices (as it was expreſſed in the affidavits) took away one *Mary Eads*, an heireſs, a little under ſixteen years of age, and worth 10000*l.* perſonal eſtate, and 900*l. per ann.* from the cuſtody of Mr. *Brierton*, to whoſe guardianſhip ſhe had been committed by the court of Chancery, (he being the young lady's uncle on the mother's ſide) and afterwards married her. And in the *management of this affair *Pierſon* was aſſiſted by lord *Offuſtone*, (the eldeſt ſon of the earl of *Tankerville*, and by ſeveral ſervants of the counteſs of *Tankerville*, who acted under the directions of lord *Offuſtone*: And a chaplain of the ſaid earl, by the like directions, applied to another clergyman (one *Barret*) to marry the young lady, promiſing him a reward from lord *O.* which he did accordingly, without a licence. And

* P 311

lord

lord *O.* was preſent at the marriage, and gave the lady away, and made *Borret* a preſent of 100*l.*

Againſt this motion it was argued by ſerjeant *Eyre*, Mr. *Noel* and Mr. *Deniſon*, that this being a taking away without force, it is no offence at common law, eſpecially as the woman appears to be of age of conſent. 4 *Mod.* 145. Neither does the preſent caſe fall within the ſtatute of 4 *P.* & *M. c.* 8. For (1) It doth not appear that the perſon who married the lady is fourteen years old, as is required by the ſaid act. (2) Here is not properly any "taking or "conveying," all being done by the lady's conſent. The words of the act alſo are, that if any perſon ſhall "unlawfully" take or convey, *&c.* which muſt mean ſuch a taking as was unlawful before; and that was only a taking by force. (3) The young woman was not taken from the poſſeſſion of ſuch an one as is deſcribed by the act, becauſe ſhe was then above fourteen, at which time a guardianſhip in ſocage ends. *Ratcliff*'s caſe, 3 *Co.* 37. And it was alſo urged, that this lady being a ward of the court of Chancery, the defendants are properly puniſhable by that court; and they have been already puniſhed there. [And to ſhew this the proceedings in Chancery were produced; whereby it appeared that the principal parties had been committed to the *Fleet*, and had paid the coſts.]

In ſupport of the motion it was argued by the ſolicitor general, ſerjeant *Draper*, and Mr. *Marſh*.

*And the whole court were clearly of opinion, (1) That this is an offence at common law: For the taking away a young woman under age, againſt the conſent of her father, though it be without force, and with her own conſent, is certainly puniſhable at common law; as appears by *The King* and *Twiſleton*†, * P 312

† 1 Sid. 387. S. C. 1 Lev. 257. And 2 Mod. 130. was alſo cited at the Bar to the ſame Point.

which is in point: And the saying in 4 *Mod.* 145. to the contrary, is not only extrajudicial, but probably misreported. Now there is no difference at common law between taking away a minor against the consent of her father, and of a lawful guardian; a guardian having (as the C. J. observed) the same remedy for taking away a ward as the father hath: namely, an action of trespass, or a writ of ravishment of ward. And (*Probyn* just. said) formerly if a lord married his ward to the disparagement of such ward, though he was intitled to the profits, yet he lost his wardship; for the principal injury is the effecting an improper marriage, it being not so material (as *Chapple* just. observed) from whose custody the minor is taken. And the C. J. said taking this as a combination for bringing about this marriage, which plainly appears to be to the disparagement of the lady, it is certainly criminal.

The whole court seemed also strongly inclined to be of opinion, (2) That this is a case within the statute of *P.* & *M.* For (1) As to the objection, that *Pierson* doth not appear to be above fourteen, the answer which hath been given at the bar is sufficient, *viz.* that unless it be shewn on the other side, this court is not to intend that any persons are not proper subjects of the laws of the land. (2) It is not necessary by the act, that the taking away should be by force, or against the consent of the infant; for the words of the preamble are, [either with flight or force:] and there is a penalty inflicted on the persons consenting. And though in this case the lady was of sufficient age as to contracting matrimony, yet she was not of age of discretion to judge for herself in a matter of so great consequence. (3) The woman was here taken from
* P 313 such a *person as had the lawful custody of her, notwithstanding she was above the age of fourteen: For (as the chief justice said) where the court of Chancery

cery appoints a guardian, ſuch guardianſhip doth not ceaſe on the ward's attaining fourteen, unleſs another guardian be then appointed. And ſo it is of a guardianſhip in ſocage; though at that age the ward hath a right to chuſe another guardian. And (by the C. J. and *Probyn* juſt.) the court of Chancery had originally the care of infants; but afterwards it was given by the ſtatute of 32 *H.* 8. *c.* 46. to the court of wards and liveries; and when that court was diſſolved, it was reveſted in the Chancery. 3 *Chan. Ca.* 136. As to the commitment by the court of Chancery, that was for a contempt only; and therefore it is no reaſon againſt puniſhing the defendants for the ſatisfaction of publick juſtice, and by way of publick example. And (as the C. J. ſaid) it would be of ill conſequence to make any difference between the principals and ſuch of their under-agents as were privy to the deſign. Stat. 12 Car. 2. c. 24.

Upon the whole therefore, whether this be conſidered as an offence at common law, or upon act of parliament, or in both ways, an information is proper.

And an information was accordingly granted againſt *Pierſon*, lord *Oſſulſtone*, the two clergymen, and all the ſervants who were concerned in and privy to the affair.

Note; When the proceedings in Chancery were firſt produced, the court refuſed to ſuffer them to be read, becauſe no affidavit was offered to authenticate them. However, leave was then given to make ſuch an affidavit. And upon another day, this being produced, Mr. ſolicitor objected to the reading of it, becauſe it was not intitled. And (*per Page* and *Probyn* juſt.) the rule of the court is, that when an information is firſt moved for, the affidavits are not intitled; but the affidavits produced upon the ſhewing cauſe ought always to be intitled, becauſe then *there * P 314

1 Stra. 704. S. P. V. *Bevan* v. *Bevan*, 3 Term Rep. B. R. 601.

is a cauſe in court. However, the affidavit being now made in court, it was permitted to be read.

The inhabitants of Cliſton and *Churcham.*

Stat. 12, 13 *Car.* 2. c. 12. impowering townſhips in large pariſhes to provide for their own poor, is not confined to the counties named in the act.

AN order was made by two juſtices for the removal of a pauper and his children from *Cliſton* to the pariſh of *Churcham*; which order, upon appeal, was quaſhed: And the order of ſeſſions ſet out, that the party was laſt legally ſettled in the hamlet of *Hindham* within the ſaid pariſh of *Churcham*, and that the ſaid hamlet hath diſtinct officers of its own, and provides for its own poor.

And it was moved by Mr. *Taylor* to quaſh this ſeſſions order, becauſe by 43 *El. c.* 2. a townſhip or hamlet cannot provide for their poor, or have proper officers appointed: And the ſtatute of 12, 13 *Car.* 2. *c.* 12. (*ſ.* 21.) which impowers townſhips in large pariſhes to provide for their own poor, extends only to the counties therein mentioned. 2 *Lev.* 142. S. C. 3 *Keb.* 422, 460, 494, 539. (S. C. *Freem.* 412. Vide *Caldecot* 89. n. a.)

But *per curiam*, the act of *Car.* 2. extends to all counties, it being equally beneficial† to all; and the counties there ſpecified are mentioned only as inſtances. And ſo *Lee* C. J. ſaid it was determined, upon great debate and conſideration, in the caſe of *The inhabitants of Stokelane* and *Doulting*, (*a*) *Hil.* 11 *A.* which caſe hath been ever ſince adhered to.

† 3 Bur. 1614 *contra.* 3 Term Rep. B. R. 748 *accord.*

(*a*) Cas. of Sett. & Remov. 43. Foley 98. Fort. 219.

2 Salk. 486. Marg. V. Bur, S. C. 37.

And

And he denied the caſes cited to be law. And he ſaid, that a pauper may be ſent to an extraparochial place, for which officers are appointed.

The motion was therefore denied.

S.C. 2 Stra. 1105.

Smith on the demiſe of Dormer, againſt *Parkhurſt and others*. * P 315

A new trial refuſed after a trial at bar, the evidence being doubtful. A new trial may be granted after a trial at bar. *Qu.* Whether it may be granted after a ſpecial verdict; and whether it may be granted after a trial at bar *in Ejectment*.

EJectment: And upon a trial at bar a ſpecial verdict was found. But before judgment was given thereon, or the ſame was argued, it was moved on behalf of the defendants, that there might be a new trial, becauſe it was found that at or before the levying of the fine, [which was part of the defendant's title] the conuſors were not, nor either of them was, ſeiſed or poſſeſſed of the lands in queſtion, or any part thereof †; and this (it was ſaid) was a fact found againſt evidence, it having been proved, that the conuſors had before received part of the rents of the eſtate, which was not contradicted by the plaintiff's evidence; and it did not appear that *Dormer*, the leſſor of the plaintiff, was ever in poſſeſſion.

On the other ſide it was argued by Mr. *Chute*, Mr. *Bootle* and others, who ſaid, that this verdict was not againſt evidence. And their principal objections (ſo far as the ſame might be collected from the reply, and the opinion of the court, for the reporter was not preſent when cauſe was ſhewn againſt the motion) were, (1) That a new trial (which is a modern invention) ought not to be granted after a trial

† V. Cowp. 621. 622.

trial at bar, by reaſon of the ſolemnity of ſuch trials. *Wheeler* and *Honour*, 1 *Keb.* 166. S. C. 1 *Sid.* 58. 5 *Mod.* 348. *Argent* and *Sir Marmaduke Darrell*, *Carth.* 505. S. C. 2 *Salk.* 648. *Groſvenor* and *Fenwick*, 2 *Salk.* 650. S. C. *Far.** 156. (2) It is material that this is an ejectment, which is not final in its nature, as other actions are, but the party againſt whom the judgment ſhall be may bring a new ejectment. *Argent* and *Darrell* before cited. *Lady Layton* againſt *Layton*, (*a*) *in the Exchequer*, *Hil.* 4 *G.* 1. Ejectment, and after a verdict found for the plaintiff, a new trial was prayed; but Mr. baron *Montague* was againſt granting it, becauſe it was in ejectment: However, the other judges being of another opinion, a new *trial was there granted. (3) A new trial ought not to be granted after a ſpecial verdict. The minutes thereof are always ſigned by the counſel on both ſides; and therefore it ought to conclude both parties. Beſides, the defendants are too early in making this application, as no opinion hath yet been given upon this verdict, which poſſibly may be for the defendants.

*i.e. 7 Mod.

(*a*) 1 P.W. 671. 2 Bro. P. C. 217 Poſt. 318. 324.

* P 316

It was farther objected, that a new trial ought not to be granted againſt the honeſty of a cauſe; and this in the preſent caſe is with the leſſor of the plaintiff, he being clearly intitled to the eſtate in queſtion, according to the intention of the makers of the deed of ſettlement, upon the conſtruction of which the matter depends: And it would be very hard that his right ſhould be taken away. This caſe is therefore ſimilar to an action brought for burning an houſe by negligently keeping a fire; where if the defendant is acquitted, the court will not grant a new trial.

Salk. 644 648. 653. 5 Mod. 88.

And it was alſo urged) the evidence of one or two witneſſes ought not to overturn the finding of twelve gentlemen of figure and fortune, who might too be governed by their own knowledge. *Hale's Hiſt. of the law* 256. And the granting of a new trial

trial would be in effect imputing perjury to them. It may alſo occaſion perjury in witneſſes, becauſe when a new trial is granted, they may be prepared before hand, as it muſt be then known upon what circumſtances the caſe will depend.

In ſupport of the motion it was argued by ſerjeant *Wright*, Mr. *Hollings*, Mr. *Filmer* and others, (1) That there is the ſame reaſon for granting a new trial after a trial at bar, as after a trial by delegated authority, where the verdict is againſt evidence. At *niſi prius* there is often a ſpecial jury, as well as on a trial at bar: And the ſolemnity of the latter is only in regard to the dignity of the court, before whom the cauſe is tried. The ſolemnity of this kind of trial is therefore a ſtrong argument in *favour of a new trial; for if a new trial is grantable on the certificate of a ſingle judge, it ſeems more reaſonable to grant one where the jury act contrary to the direction or againſt the opinion of the four judges. The reaſon of granting new trials originally (which is of conſiderable antiquity, as appears by *Style* 462, 466. 1 *Keb.* 49. *Salk.* 648.) was the great difficulty of ſucceeding in attaints, it being rare for one jury to convict another, leſt they ſhould fall one time or other into the ſame condition. Now in all caſes where an attaint lay, a new trial (which is a more known, ſhorter, and more beneficial method) may be granted; for where a verdict is found againſt evidence, it is a ſtrong proof of corruption in a jury. Beſides, an attaint is in ſome caſes impracticable, becauſe it is not ſufficient to ſupport an attaint, that the verdict was found againſt evidence, unleſs there be ſome further proof of corruption in the jury; and therefore in ſuch caſes there is no other remedy than the granting a new trial; for the jury cannot be fined. *Vaugh.* 145, 146. 1 *Keb.* 864. The granting of new trials is therefore for the ſake of juſtice; And the court has

* P 317

from

from time to time extended its own rules, in order to meet with and remedy ſuch inconveniencies as have ariſen. As for inſtance, a new trial was not formerly grantable for the miſdirection of a judge, [1 *Sid.* 226.] whereas now this is always done. And as the judgments of this court are not final, there is no ſolid reaſon why the finding of a jury, though it be on a trial at bar, ſhould be ſo. To this point the following books and caſes were cited. *Style* 462, 466. [which was ſaid to be the firſt printed caſe of granting a new trial]. 5 *Mod.* 348. 2 *Vern.* 378. S. C. *Abr. Ca. Eq.* 378. *Muſgrave* and *Nevinſon*, *(b) Eaſt.* 10 *G.* 1. *Mandamus* to the defendant to ſwear in Sir *Chriſtopher Muſgrave* as mayor; and the defendant made a return, which was traverſed, and tried at the bar: And afterwards a new trial was granted, becauſe the verdict was againſt evidence. *King* and *the corporation of Bewdley*, *(c) Hil.* 11. *A.* After a trial at bar, a new trial was prayed by the defendants, becauſe a general verdict was found when a ſpecial one *was directed; and it was inſiſted by the defendants, that as the crown, which was the proſecutor, never pays coſts, it ought not to receive any: But to this the court ſaid, that the granting a new trial was purely diſcretionary; and if the defendants inſiſted upon not paying coſts, this might be a reaſon againſt granting it. A new trial was however granted, upon the payment of coſts: And yet according to lord *Coke*, (1 *Inſt.* 228. *a.*) a jury may take on them the knowledge of the law. *Harding* and *Crew.* An iſſue was there directed by the court of Chancery to try the validity of a deed; and the chief juſtice of *Cheſter* (before whom it was tried) informing the court that he was not ſatisfied with the verdict, a new trial was granted, becauſe an infant was concerned, and the matter

(b) 2 Ld. Ray. 1358. Stra. 584.

(c) 1 P. W. 207. 2 Ld. Ray. 1359.

* P 318

ter in queſtion was of great value. And ſerjeant *Wright* now ſaid; that in lord *Pratt*'s time, after a trial at bar upon the queſtion, whether a perſon was *compos* or *non compos*, a new trial was granted, becauſe the verdict was againſt evidence. (2) In ejectment, where the verdict is for the defendant, there is no inconvenience in putting the plaintiff to a new ejectment, becauſe in ſuch caſe the poſſeſſion is not changed, (which is the reaſon mentioned in *Salk.* 648.) But where the verdict is for the plaintiff, and againſt evidence, it is reaſonable to grant a new trial, becauſe otherwiſe the defendant muſt be turned out of poſſeſſion, and a neceſſitous perſon may be let in, who will perhaps hurt the eſtate in queſtion, by committing waſte. Beſides, the granting a new trial is a leſs expenſive method than the ſerving another ejectment; ſo that the former will be an eaſe to both parties. And to this point the following caſes were cited: *Layton* and *Layton*, *Hil.* 4 *G.* 1. *in Scacc'*. A new trial was there granted, after a verdict for the defendant in ejectment, Mr. baron *Montague* only diſſenting: And yet Mr. baron *Price*, who tried the cauſe, did not report, that the verdict was againſt evidence, but only that if he had been upon the jury, he ſhould not have concurred in the verdict. And the reaſon of granting a new trial there was, that if the defendant had continued in poſſeſſion, he might have diſmiſſed a bill then *depending, and retained in Chancery, till the trial of the iſſue; which would have been to the great expence of the plaintiff. *Letgo, on the demiſe of Wheeler*, againſt *Pitt*, *(d)* *Mich.* 8 *G.* 2. *in C. B.* Ejectment, and upon a trial before C. J. *Eyre* at *Weſtminſter*, a verdict was given for the plaintiff. Afterwards a new trial was prayed, becauſe it was a verdict againſt evidence; to which it was objected, that a new ejectment may be brought.

Tilly or *Tyley* v. *Roberts*. 2 Lord Raym. 1360. Stra. 585.

Ante 315.

* P 319

(d) Barnes, 439. Prac. Reg. C. B. 408.

And

And the C. J. ſaid, that this is a good reaſon where the verdict is againſt the plaintiff; but otherwiſe it is where the verdict is againſt the defendant, becauſe he muſt be turned out of poſſeſſion: And a new trial was granted. *Baker, on the demiſe of Brown*, and *Petcher*, (e) *Mich.* 8 *G.* 2 *in C. B.* After a verdict in ejectment for the defendant, a new trial was granted, on the motion of ſerjeant *Skinner*, becauſe there was a ſuſpicion of forgery in one of the deeds. *Simple* and *Hunt*, *Mich.* 2 *G.* 2. *in K. B.* Motion for a new trial in ejectment, becauſe one of the witneſſes was ſuddenly taken ill, ſo that he could not attend the trial. And *Raymond* C. J. ſaid, that it was rare to grant a new trial in ejectment, unleſs the verdict be againſt evidence; which was an admiſſion, that in ſuch caſe it may be done. *Dobbs* and *Paſſer*, (f) *Eaſt.* 7 *G.* 2. *in K. B.* Motion to ſet aſide a judgment by default in ejectment, becauſe it was ſigned by ſurprize: Which was oppoſed, becauſe it was in an ejectment, and a new one may be brought. But *Hardwicke* C. J. ſaid, that it would be very inconvenient to change the poſſeſſion of an eſtate, and the courts ought to take great care to prevent it; and therefore the motion was granted. *Muſgrave* and *Nevinſon* before cited. A new trial was there granted upon a *mandamus*, becauſe the verdict was againſt evidence; and yet a *mandamus*, like an ejectment, doth not finally determine the right: For a *quo warranto* may be afterwards brought. *Bagſhaw, on the demiſe of Sir George Wynne*, againſt *the biſhop of Bangor and others*, in the Exchequer, this term. A new trial was there granted in ejectment, after a verdict for the plaintiff, becauſe the plaintiff offered evidence to the jury in private; and one of them ſaid, he would find a verdict for the plaintiff right or wrong. (3) There is no difference as to the preſent point between a general and [illegible] verdict, becauſe the court is as much tied

(e) Barnes, 440.

(f) 2 Str. 975—2 Barnard. 431.

tied down by facts found in the latter, as by a general finding: And if thoſe be falſe the judgment of the court muſt be ſo too. Verdicts are intire things; and where part is found wrong, it is all one as if the jury had omitted ſomething which they ought to have found; and it is certainly an imperfect finding. *Co. Lit.* 227. *a.* 5 *Co.* 97. *a.* 10 *Co.* 119. *a.* 2 *Roll.* 702. *Cro. Jac.* 627. 2 *Sid.* 86. 2 *Keb.* 226. *Kynaſton* and *the mayor, &c. of Shrewsbury*, (*g*) (*g*) Ante 85. There the houſe of lords ſet aſide a verdict, upon a *mandamus* for omitting the giving 1*d.* damages, and ordered a *venire facias de novo*. *Neminick* and *Farewell*, (*h*) *Mich.* 6 *G.* 1. *in Scacc'*. In trover, againſt a cuſtom-houſe officer for a ſeiſure, a ſpecial verdict was found, and the notes ſigned by the counſel on both ſides. In the verdict it was found, that there was no probable cauſe of ſeiſure; and a report was made by the lord chief baron, who tried the cauſe, to the contrary. And upon the motion of *Lechmere* attorney general, a new trial was granted, upon the payment of coſts. As to the ſigning of the minutes, there is a neceſſity for that; but it does not amount to a conſent that the facts are true, but only that they are found ſuch by the jury. (*h*) Bunb. 51.

It has been objected, that it is too early to make this application before the opinion of the court is given. Anſwer: There certainly ought to be a recent application in theſe caſes; and if the defendants were to ſtay till the reſolution of the court was given, it might with more reaſon be objected, that it is then too late.

Objected, That a new trial ought not to be granted againſt the honeſty of the cauſe. Anſwer: This ſeems rather in the preſent caſe to be with the defendants; theſe being immediately deſcended from the makers of the ſettlement, upon which the preſent queſtion

queſtion depends; whereas the leſſor of the plaintiff
* P 321 claims ſo remote as from a *fifth brother. And the hardſhip of the caſe would be on the ſide of the defendants, if their right ſhould be taken away, and they turned out of poſſeſſion.

As to the objection, that the jury might perhaps go upon their own knowledge; this, if allowed, will put an end to the granting a new trial in any caſe whatſoever, becauſe on ſuch a ſuppoſition no verdict can be ſaid to be found againſt evidence. A jury are by their oaths obliged to go according to evidence, *i. e.* the evidence given in court: And if a jury-man be prepoſſeſſed, it is a good cauſe of challenge; which ſeems to be a proof that a juror ought not to go by his own knowledge. If a juror does indeed know any thing material in the cauſe, he ought to acquaint the court therewith, and be ſworn as a witneſs, that he may be croſs-examined. *Far.* 2. 1 *Salk.* 405. And otherwiſe he may go upon inſufficient and improper evidence. *Cro. El.* 189. 2 *Hale's Hiſt. P. C.* 306, 307. Suppoſing therefore that here any of the jury went on their own knowledge, without acquainting the court therewith, it is ſuch a miſbehaviour as is a ſufficient foundation for granting a new trial. In *Kitchen* and *Manwaring*, (*Paſ.* 12 *G.* 1. *in K. B.*) a new trial was prayed, becauſe, after the withdrawing of the jury, one of them offered evidence to the others; but it was refuſed, becauſe *Powell* juſt. who tried the cauſe, reported that the verdict was according to evidence; otherwiſe a new trial would have been granted. It cannot be ſaid with reaſon (as hath been objected) that the granting a new trial is an imputation of perjury to the jury; for they may as well be miſtaken as to matter of fact, as the judges (who are ſworn as well as jurors) may err in point of law; and their judgments

ments are reverſible by writs of error. And as to what has been ſaid, that the granting a new trial may occaſion perjury; this is no ſolid objection, for that the court ought to do right whatever may be the conſequence.

The court took time to adviſe; and this term *Lee* C. J. delivered the opinion of the court to the following effect.

*This caſe hath been largely ſpoken to on both ſides; and it is proper to take notice, as well of what has been mentioned at bar, and how far the caſes have gone upon applications for new trials, as to give an opinion upon the point now in queſtion. * P 322

It is not neceſſary now to inquire into the original of the court's exerciſing the power of granting new trials. In *Salk.* 648. there is a conjecture of lord chief juſtice *Holt*, that it is antient; and he gives his reaſon: And in *Style* 466. there is a ſaying of *Glynne*, that it had been frequent to grant new trials. In the caſe of *Bewdley*, ſome notice being taken of the power of granting new trials, lord chief juſtice *Parker* ſaid, that it is difficult to trace a matter of this nature to its origin, there being but few reports of caſes upon motion before the time of *Car.* 1. Thus much however is certain, that the firſt caſe in print, where a new trial was granted, is in *Style's Reports*, whereby it appears the court has exerciſed this power for more than eighty years. 1 P. W. 213. 214.

The reaſon of the court's having interpoſed in this way is, that juſtice may be furthered, and that right may take place. And therefore in caſes that are hard, or againſt the honeſty of the caſe, new trials have been refuſed. *Salk.* 644, 646. It has been objected in the preſent caſe, that the ſetting aſide a verdict, and granting a new trial, amounts to ſaying, that the jury are perjured. But this is a miſtake,

for

for a verdict is only a judgment given upon a compariſon of proofs: And the judges may be ſaid with equal reaſon to be guilty of perjury when they give erroneous judgments, as a jury in the former caſe. But in neither caſe are errors to be imputed for crimes. *Bract.* 289. As the duty of courts therefore is to do juſtice, and as in actions that are final, where there is a falſe verdict, the only remedy was an attaint, (which has been conſidered as no remedy; particularly by lord *Parker*, in the caſe of *Bewdley*, by reaſon of the difficulty of the *proceed-
* P 323. ings, and the ſeverity of the puniſhment) the courts have gone into this eaſier remedy of granting new trials; but then it has been always upon terms, *viz.* the payment of coſts.

The next matter to be conſidered is, how far the courts have proceeded in the exerciſe of this power; and particularly what they have done after a trial at bar, after a ſpecial verdict, and after a trial in ejectment.

V. *Bright* v. *Eynon*, 1 Bur. 395. V. 2. Atk. 320. 1 Vef. 28.

As to the firſt of theſe points, it is certain that ſome of the books ſay, a new trial ſhall not be granted after a trial at bar, becauſe the verdict is againſt evidence, but only in caſes where there is a miſbehaviour in the jury. 5 *Mod.* 349. And in *Salk.* 650. it ſeems to be the opinion of three judges, that in ſuch caſe a new trial cannot be granted; and the reporter makes the court ſay, that it was never done. But this is contrary to the caſes in *Style* 462, 466. 1 *Sid.* 58. and cannot be law. *Farr.* 156. It is alſo contrary to the opinion of eleven judges, (*Powell* juſt. diſſenting) in the caſe of *Bewdley*, which was a trial at bar. And in Sir *Chriſtopher Muſgrave* and *Nevinſon*, (*Eaſt.* 10 G. 1.) the opinion of the court was, that if a verdict is againſt evidence, a new trial ought to be granted after a trial at bar; but otherwiſe

Ante 317.

otherwiſe it is where the evidence is doubtful only. In that caſe the verdict was againſt evidence; for the queſtion was, whether Sir *Chriſtopher Muſgrave* was a good alderman; and it appeared that he was choſen alderman at an aſſembly held without notice, and where ſeveral of the common council were abſent. Upon this the jury were directed, and certainly very rightly, to find againſt the election; but they found to the contrary: For which reaſon a new trial was granted.

It is not neceſſary at preſent to give any opinion whether a new trial may be granted after a ſpecial verdict, where one of the facts found by the jury is againſt evidence; as it is alledged to be in this caſe. I ſhall leave this as a point undetermined, upon the foundation of the *caſes that have been cited; which are two only, *viz.* *Neminick* and *Farewell in Scacc'*, *Mich.* 6 *G.* 1. and 2 *Keb.* 226. When that caſe in the Exchequer comes to be conſidered, it ſeems hard to reconcile the power of the court in granting a new trial, where the objection is only to one ſingle fact, to the reaſoning in the books relating to the office of jurors, as they are judges of matters of fact. In *Buſhell's* caſe much is ſaid upon this head; and a difference is there expreſly taken, by lord *Vaughan*, between a general and ſpecial verdict. Theſe are the difficulties upon this point.

* P 324

Ante 320.

Vaugh. 135.

The next queſtion is neceſſary to be conſidered in the preſent caſe, this being a trial at bar in ejectment. Now the books that have been cited againſt the motion, are very ſtrong againſt granting a new trial in ſuch caſe; particularly *T. Jones* 225. *Salk.* 648. By the report in *Salk.* it does not appear for whom the verdict was; but by the report of the ſame caſe in *Carth.* 507. and alſo in a manuſcript which I have ſeen, it appears to have been for the plaintiff: And in the manuſcript report, the opinion is mentioned

to

to have been given by the whole court; though ſerjeant *Salkeld* ſays, that *Rokeby* juſt. diſſented. This caſe anſwers the diſtinction taken at the bar between a verdict in ejectment for the plaintiff, and a verdict for the defendant, on account of the inconveniency of changing the poſſeſſion. On the other ſide, no caſe hath been cited where a new trial was granted after a trial at bar in ejectment. There are indeed inſtances hereof after a trial at *niſi prius*. So was lady *Layton*'s caſe, which was an iſſue out of Chancery ‡: But there the motion was granted againſt the opinion of one of the judges; who declared, that in ejectment he was againſt granting a new trial, becauſe the proceedings are not final. By granting a new trial therefore in this caſe, we ſhould do more than we are warranted by the books. However, I ſhall not ſay that it may not become neceſſary to interpoſe in that way, even in ejectment, for the ſake of juſtice. This hath induced the court from time to time to grant new *trials, as caſes have ariſen, which have demanded from the juſtice of the thing a freſh trial. And therefore now a new trial is always granted where the judge miſdirects the jury, though the old caſes are to the contrary. 1 *Sid.* 226. So formerly a new trial was denied where a party has been acquitted in a criminal proſecution, though ſome of the jury miſbehaved themſelves, (1 *Lev.* 9, 124.) but otherwiſe it is at this day. *Salk.* 646. And ſo in ejectment, a caſe may be (for aught I know) of that nature that it may be proper to grant a new trial therein. The objection, that the proceedings in ejectment are not final, is equally applicable to the caſe of *Muſgrave* and *Nevinſon*; which was upon a return to a *mandamus*.

But ſee 4 Bur. 2224.

‡ This is a miſtake. See 1 P. W. 671.

* P 325

In

In the next place, the circumſtances of the preſent caſe are proper to be conſidered. And here I will premiſe this as an undoubted truth, that where the evidence is doubtful, a new trial ought not to be granted after a trial at bar. Now the evidence given upon the queſtion, whether the defendants were in poſſeſſion at the time of their levying the fine, was as follows: One of the defendants witneſſes being aſked, who was in poſſeſſion at the time of the death of *Robert Dormer*, which was 1726. his anſwer was, that the defendants (the daughters) were ——— that he was ſent down by them to the tenants of the premiſſes, and received of the tenants [mentioning *Collins* as one] rents amounting to 226*l.* the whole eſtate being about 600*l.* or 700*l.* *per ann.* and that he gave receipts in the names of the daughters, and paid the rent over to them. Upon his croſs-examination, he being aſked about Mrs. *Dormer*, the widow, he ſaid, that ſhe came into poſſeſſion of the manſion-houſe 1726. ——— that Mrs. *Dormer* had the liberty given her of chuſing what tenants ſhould pay her 300*l.* *per ann.* out of the eſtate:——That when he received the above rent, he did not know whether ſhe had made election or not.——And further he ſaid, that Mrs. *Dormer* had paid money to the parſon by way of compoſition for tithes.——Another witneſs depoſed, that he had heard Mrs. *Dormer* ſay, that ſhe lived in the *manſion-houſe by the charity of her daughters; and that ſhe was inclined to chuſe *Collins* for one of her tenants. Upon this ſtate of the evidence it is plain that there was no proof of an actual entry by the defendants; and the manner in which the rents were received, ſeems to ſhew, that they had no other poſſeſſion than by receiving part of the rents after Mr. * P 326

juſtice *Dormer*'s death: And there was no evidence of any receipt but two only. What the title of the defendants was in reſpect of eſtate, the jury could not judge; and all that appeared relating to Mrs. *Dormer*'s intereſt was, that ſhe had 300*l. per ann.* given to her by the will of Mr. juſtice *Dormer*; which at beſt is very dubious evidence of her eſtate. As this whole evidence hath the appearance of great uncertainty in it, the queſtion upon the poſſeſſion was left intirely to the jury; and this agreeable to the opinion of a very great man; I mean the lord chief juſtice *Vaughan*, in *Vaugh.* 144. For taking it for granted that the rent received by the defendants agent was applied to their uſe, (which I ſuppoſe was the caſe) yet this alone ſeems inſufficient to determine that they were in poſſeſſion of the eſtate: And the verdict muſt be againſt all evidence, in order to intitle the party to a new trial. It appeared in evidence by a ſettlement produced, that *Robert Dormer* was tenant for ninety-nine years, determinable on his life; remainder from and after his death, or other ſooner determination of the eſtate limited to him, to truſtees for his life to preſerve contingent remainders; remainder to the firſt and other ſons of *Robert Dormer* in tail male, with remainders over. It further appeared, that *Robert D.* and *Fleetwood* his only ſon, levied a fine, and ſuffered a common recovery; and that *Robert Dormer* afterwards died, leaving iſſue only four daughters, the defendants. Now if on this fine and recovery it may be taken for certain that *Robert D.* became ſeiſed in fee, I ſhould then think that the receipt of the rent by his heirs is ſufficient evidence of their having been in poſſeſſion; but to ſay this, would be a determination of the great queſtion between the parties, whether the fine and recovery had this operation or not. As to the fine; if this

this *be conſidered as a fine levied by *Robert D.* who was tenant for years only, it operates nothing. 5 *Co.* 124. In 1 *Inſt.* 332. *b.* lord *Coke* indeed ſays, that if tenant in tail makes a leaſe for years of land, and afterwards levies a fine thereof, this is a diſcontinuance; for a fine is a feoffment on record, and the freehold paſſes: But in *Hunt* and *Bourne*, (which is reported in *Salk.* 339. and of which I have ſeen the reſolution of the court, under lord *Holt*'s own hand) lord *Holt*, taking notice of the ſaying of lord *Coke*, that a fine is a feoffment upon record, ſays, that this is an expreſſion by way of ſimilitude only, but not proper and legal; for that a fine and feoffment are a different ſpecies of conveyance, and there is no ſuch thing as a feoffment upon record. A fine *come ceo* (he ſays) ſuppoſes a previous feoffment; and they have different operations: And he cited *Buckler*'s caſe, 2 *Co.* 56. *a.* though that part of the caſe has been queſtioned in *Cro. Car.* 484. And it was alſo ſaid by lord *Holt*, that if a tenant for years makes a feoffment in fee, it deveſts the eſtate out of the leſſor, (3 *Co.*) but a fine by a termor *nil operatur.* Upon theſe authorities, it ſeems very clear, that in this caſe by the fine no eſtate was deveſted, nor a fee gained. I ſhall ſay nothing at preſent of the operation of the recovery. Upon the whole matter the queſtion therefore is, whether, as nothing is yet determined in relation to the defendants right, they are not to be conſidered as mere ſtrangers at the time of the receipt of the rent; for the leſſor of the plaintiff hath plainly a title under the ſettlement, and that of the defendants was then at leaſt very doubtful. Now it is very clear, that the receipt of rent is not ſufficient proof of poſſeſſion, if the perſons to whom it is paid do not appear to have a title, but are conſidered as ſtrangers. *Hob.* 322. 1 *Roll.* 659. *pl.* 8, 12.

* P 327

v. 3 Atk. 141.

As therefore it does not appear that the defendants have any title, and consequently their receiving rent, without an actual entry, was not sufficient to give them possession; and as it is a principle always adhered to, *that after a trial at bar, where the evidence is doubtful, a new trial shall not be granted; we are all of opinion, that a new trial ought not to be granted in this case.

* P 328

See *Doe* v. *Williams*, Cowp. 621. where this case is cited by Lord *Mansfield*.

S. C. 2. Stra. 1106.

Vaughan against *Browne*.

The defendant sued as executor pleads a retainer for a debt due to himself; to which plaintiff replies that the defendant is executor *de son tort*; the defendant rejoins that letters of administration were granted to him *puis darrein continuance*; this held to be good, on demurrer.

DEBT on bond against the defendant as executor of the last will and testament of one *Walter* [the obligor], to which the defendant pleads, that he recovered a judgment against the said *Walter* in his life-time for 240*l.* and that he is executor of the last will and testament of the said *Walter*; and then the defendant shews a retainer in his hands to satisfy the said judgment, and that he hath not assets *ultrà*, *&c.* The plaintiff replies, that defendant is executor of his own wrong, and not a lawful executor. And the defendant rejoins, that after the last continuance [there being an imparlance from *Hilary* to *Easter* term] letters of administration have been granted to him of the goods, *&c.* of the said *Walter*; and he demands judgment if the plaintiff ought further to proceed against him. To this the plaintiff demurs.

This

This caſe was firſt argued laſt *Eaſter* term by Mr. *Deniſon* for the plaintiff, and ſolicitor general *Strange* for the defendant; and laſt *Hilary* term by Mr. *Filmer* for the plaintiff, and Sir *Thomas Abney* for the defendant; and it was again argued this term by Mr. *Burrell* for the plaintiff, and Mr. *Hatſell* for the defendant.

It was argued on the ſide of the plaintiff, that neither of the defendant's pleas taken ſeparately (as they muſt be) is good.

This firſt is ill, becauſe it is not thereby ſhewn that the defendant is a lawful executor: For though he be declared againſt as an executor generally, there is no other way of charging him. Beſides, in the replication *it is expreſly ſhewn, that he is only executor *de ſon tort.* Now that ſuch an one cannot retain, appears by *Coulter's* caſe, 5 *Co.* 30. S. C. *Moor* 527. S. C. *Cro. El.* 630. S. C. 1 *Roll.* 922. *Yelv.* 137. 1 *Mod.* 208. 2 *Mod.* 51. * P 329

As to the other plea, this is ill; (1) Becauſe it is a waiver of the former plea, and the matter therein contained is not pleadable in bar, but only in abatement. 2 *Lev.* 190. 1 *Salk.* 296. That it is a relinquiſhment of every thing comprized in the firſt plea, may be deduced from the reaſon of the common law, which does not admit of pleading two diſtinct matters in bar of the whole demand; from the old manner of pleading *puis darrein continuance,* (*Co. Entr.* 517. *b. Raſt. Entr.* 549.) and alſo from the conſtant form of proceeding, where iſſue is taken on the plea *puis darrein continuance*; in which caſe a *venire facias* is awarded to try the iſſue joined between the parties; and at *niſi prius* the firſt plea is never tried. *Cro. Jac.* 261. From this laſt circumſtance it follows, that if the defendant may take advantage of the matters firſt pleaded, *viz.* the judgment and

defect

defect of aſſets, it might be very prejudicial to the plaintiff; for he could not plead *nul tiel record*, or controvert the want of aſſets, becauſe the ſurrejoinder muſt only traverſe the rejoinder. And though to ſome purpoſes an adminiſtration relates to the death of the inteſtate, yet it ought not in the preſent caſe, as it would hurt a third perſon; which a relation never ſhall do. *Co. Lit.* 150. *a.* *Hob.* 49. 2 *Vent.* 180. 1 *Salk.* 297. For theſe reaſons the laſt plea is a waiver of the former; and ſo it appears by *Bro. Waiver* 23, 38. *Regula placitandi* 63. *Hale's Analyſis* 138. *Cro. El.* 49. And though in *Hob.* 81. S. C. *Moor* 871. it is held, that a plea *puis darrein continuance* is a waiver of the former plea upon iſſue joined, but not after a demurrer; yet this diſtinction was diſallowed in *Barber* and *Palmer*, *(a)* (*Salk.* 178.) of which caſe Mr. *Filmer* ſaid, he had a manuſcript report, which is as follows: Debt on bond, to which defendant pleaded a compoſition; and the plaintiff demurred. The defendant pleaded *puis darrein continuance*, a defeaſance of *the bond. But the court held, that what was pleaded as a defeaſance, amounted to a covenant only; whereupon the defendant would have reſorted to his firſt plea: But the court held, that this was relinquiſhed by the laſt. Beſides, in the preſent caſe, the laſt plea is a departure from the firſt, (*Co. Lit.* 304. *Bro. Replication* 26.) and utterly inconſiſtent therewith. *Bro. Continuance* 60. For in the one, the defendant ſets up a right to retain as executor; (which implies a will to have been made; in which caſe no adminiſtration could be granted. 1 *Roll.* 907. *pl.* 4.) and in the other as adminiſtrator: Whereas the intereſts and powers of an executor and adminiſtrator are in many reſpects very different. *Plowd.* 279. *b.* 280. *a.* 2 *Inſt.* 397. 5 *Co.* 28. *a.* (2) This laſt plea is ſubſtantially ill, becauſe it comprizes a matter which hath been done by the defendant himſelf, and might have exiſted at the time

(a) 1 Ld. Ray. 693. 12 Mod. 539.

* P 330

time of the firſt plea, if it had not been owing to his own lacheſs. *Bro. Continuance* 60, 81. And there are many caſes where a perſon ſhall loſe the benefit of a thing by his lacheſs, which otherwiſe he might have availed himſelf of. *Bro. Lacheſs* 14. *Co. Lit.* 31. *b.* 131. *a.* 5 *Co.* 88. *a.* (3) The matter here pleaded will not ſo much as abate the writ, much leſs be a good plea in bar, becauſe the defendant might have adminiſtered ſome, and perhaps all, of the inteſtate's goods before the adminiſtration; and conſequently the plaintiff may charge him either as executor *de ſon tort*, or as adminiſtrator. 2 *Vent.* 179.

On the other ſide it was admitted, that an executor, unleſs he ſhews himſelf to be a lawful one, cannot retain; and that where a perſon acts as executor *de ſon tort*, and afterwards takes out adminiſtration, he may be charged either as executor or adminiſtrator. *Cro. El.* 102. But it was urged, that the juſtice of this caſe is clearly with the defendant; for as he ſhews himſelf in his rejoinder to be an adminiſtrator, (which is admitted by the demurrer) he has a right to retain his own debt, as well as a lawful executor: And in both caſes the retainer may be given in evidence. *Plowd.* 184. 1 *And.* 24. 2 *Roll.* *684. *pl.* 8. 1 *Roll.* 922. *pl.* 2. *Hob.* 127. 1 *Brownl.* 73, 75. *Grey* againſt *Briſkal, at niſi prius in Middleſex, Trin. term* 1736. In this caſe it was held by lord chief juſtice *Hardwicke*, upon the above authorities, that a retainer may be given in evidence. And that an adminiſtration relates to the death of the inteſtate, eſpecially for the purpoſe of preſerving a right, or purging a ſuppoſed wrong, which the adminiſtrator was guilty of before, appears by *Style* 337. S. C. 1 *Roll.* 923. S. C. cited and admitted for law in 2 *Vent.* 180.

* P 331

S. P. Comyn's Rep. 146. 3 Bur. 1382. 2 Blacſt. 965.

As to the objection, that a plea *puis darrein continuance* is a waiver of the firſt plea; this is true when they are inconſiſtent: But in the preſent caſe there

there is no inconſiſtency. For in the firſt plea the defendant doth not plead, but only admit, that he is executor; and what he relies on is the judgment and his right of retainer; which laſt point is fortified by the rejoinder. And the reſt of the plea relating to the judgment and aſſets may properly be incorporated therewith, as the only circumſtance departed from is the defendant's being an executor. *Co. Lit.* 304. *a.* *Style* 337. S. C. 1 *Roll.* 923. *pl.* 12. Beſides, this pleading is not only conſiſtent, but very honeſt and true; neither could the defendant have pleaded in a different manner; for he could not ſay, at the time of the firſt plea, that he had not acted as executor, or that he was adminiſtrator. 1 *Mod.* 208. Neither is the plaintiff prejudiced by this way of pleading.

Objected, That it is owing to the lacheſs of the defendant he had not adminiſtration before. Anſwer: The granting of an adminiſtration is not the act of the party, but of a court; and for aught appears, it might have been a matter *ſub judice* pending the preſent ſuit. It may therefore without prejudice to the defendant, and it muſt be admitted, that where the matter pleaded *puis darrein continuance* ariſes from the act of the party himſelf, it is a waiver of what is pleaded before, eſpecially if the words *P 332 * "*verificatione relicta*" are inſerted in the plea: And (*b*) 1 Ld. Ray 691. 2 Salk 519. 12 Mod. 541. Holt. 560. ſo it was held in *Pierce* and *Paxton*, (*b*) *Trin.* 13 *W.* 3.

In the principal caſe the court admitted, that a matter which was *in eſſe* at the time of the firſt plea, cannot be taken advantage of by way of plea *puis darrein continuance*: And ſo perhaps (*Lee* C. J. ſaid) is the caſe when the non-exiſtence thereof is owing to the lacheſs of the party. And they alſo ſeemed to admit, that where a plea *puis darrein continuance* contains the words [*relicta verificatione*], or is inconſiſtent

ſiſtent with the firſt plea, it is a waiver thereof, according to the caſe of *Barber* and *Palmer*. But the whole court agreed, that in this caſe the rejoinder is good, both pleas being conſiſtent; and it not appearing to be owing to any fault in the defendant that the adminiſtration was not granted to him at the time of the firſt plea. For (as to the firſt point) it muſt now be taken that the defendant was charged in the declaration as executor *de ſon tort*; and the firſt plea muſt be underſtood in the ſame ſenſe: So that this plea is not departed from, but fortified by the rejoinder; as it is thereby ſhewn upon what grounds the defendant adminiſtered the goods of the inteſtate. And as to the time of granting the adminiſtration, this cannot be conſidered or intended to be owing to any lacheſs in the defendant, becauſe the granting of adminiſtration is the act not of the party but of a court, which is no more in his power than the act of God. If the plaintiff hath loſt any advantage by this manner of pleading, it ariſes from himſelf, becauſe he might have replied *per fraudem*, or aſſets *ultra*: Whereas this matter he waives, and places the whole ſtrength of his caſe on the want of right in the defendant to retain; ſo that he obliged the defendant to plead in the manner he hath done, and he could not plead otherwiſe. But *Probyn* juſt. inclined to think, that as the antient way of pleading was *ore tenus* at the bar, the firſt plea and rejoinder conſtitute but one defence; and conſequently the plaintiff may put any part thereof in iſſue.

*Upon the whole record therefore no right appears for the plaintiff; for though a perſon taking out adminiſtration after having intermeddled with the goods of a deceaſed, ſhall not thereby defeat a ſuit before brought againſt him as executor *de ſon tort*, becauſe the action was well commenced, and the appellation of the defendant right, yet ſuch adminiſtration will legitimate * P 333

legitimate all intermediate acts *ab initio*, and juſtify a retainer. 1 *Roll.* 923. S. C. *Style* 337. 1 *Sid.* 76. S. C. 1 *Keb.* 285. 2 *Vent.* 179.

Judgment *niſi*, *&c.* by the end of the term for the defendant. And the reporter believes no cauſe was ſhewn to the contrary.

Sir *J. Strange* in his report ſays that the defendant had judgment. See upon the ſubject of this caſe, *Curtis* v. *Vernon* 3. Term Rep. 587.

S. C. Cas. T. Hardw. 413. Cas. T. Talb. 55. 245.

Sabbarton againſt *Sabbarton and others.*

Teſtator bequeaths a term for years, in truſt for C. C. for her life; and if ſhe marry B. S. then after her death, in truſt for the ſaid B. S. for life and after his death, for the firſt and other ſons of the ſaid B. S. and S. C. and their heirs male reſpectively according to priority of birth; and for default of ſuch iſſue male, then in truſt for the daughter and daughters of the ſaid B. S. and C. C. and in caſe there ſhall be no iſſue of the ſaid marriage then in truſt for the iſſue of the ſurvivor of them the ſaid B. S. and C. C. But if neither of them ſhall leave any iſſue, then in truſt for S. S. for life, and after her deceaſe, in truſt for all ſuch child and children as teſtator's brother J. S. ſhall leave living, that ſhall attain the age of 21. After teſtator's death B. S. and C. C. intermarry and die without leaving iſſue. S. S. alſo died without iſſue, and J. S. died in the life time of C. C. leaving two ſons then 21 years of age and upwards: the deviſe to them held to be a good one under the circumſtances that had happened.

THIS was a caſe ſent out of the court of chancery, by the late lord chancellor *Talbot*, for the opinion of this court, and it was as follows.

Joſeph Sabbarton being ſeiſed of lands in fee, and poſſeſſed of a conſiderable ſtock in the bank of *England*, and in the orphans fund, by his laſt will dated 20 *April* 1710. deviſed and bequeathed the ſame unto truſtees, and to the ſurvivor of them, and the heirs, executors and adminiſtrators of ſuch ſurvivor, upon truſt to pay the rents and produce of the ſaid lands and ſtock to *Catherine Carr* for her life; and if ſhe do marry *Benjamin Sabbarton*, then after the death of the ſaid *Catherine Carr* in truſt to and for the ſaid *Benjamin Sabbarton* for his life; and after his death in truſt to and for the firſt ſon of the ſaid *Benjamin Sabbarton*, and *Catherine Carr* and his heirs male, and ſo on to the ſecond, third and fourth, and all the other ſons of the ſaid *B. S.* and *C. C.* and their heirs male reſpectively, according to ſeniority of age

and

and priority of birth; and *for default of ſuch iſſue male, then in truſt for the daughter and daughters of the ſaid *B. S.* and *C. C.* equally to be divided between them ſhare and ſhare alike. And in caſe there ſhall be no iſſue of the ſaid marriage, then in truſt to and for the iſſue of the ſurvivor of them the ſaid *B. S.* and *C. C.* but if neither of them the ſaid *B. S.* and *C. C.* ſhall leave any iſſue, then in truſt for his [the teſtator's] ſiſter *Sarah Sabbarton* for her life, and after her deceaſe, in truſt for all ſuch child and children as his [the teſtator's] brother *John Sabbarton* ſhall leave living, or his wife *enſeint* with, that ſhall attain the age of twenty-one years, and to and for the heirs, executors and adminiſtrators of ſuch child and children, equally to be divided between them ſhare and ſhare alike, as they ſhall attain the age of twenty-one years, and if no ſuch child or children ſhall attain the age of twenty-one years, then in truſt for the teſtator's right heirs.—— But in caſe the ſaid *C. C.* ſhall not marry the ſaid *B. S.* then in truſt after her death for the ſaid *Sarah Sabbarton* for life, and after her death in truſt for the child and children of the ſaid *John Sabbarton* that ſhall attain the age of twenty-one years, and to the heirs, executors and adminiſtrators of ſuch child and children, equally to be divided between them ſhare and ſhare alike, as they ſhall reſpectively attain the age of twenty-one years; and if no ſuch child or children ſhall attain the age of twenty-one years, then in truſt for the teſtator's right heirs. And the teſtator gave the *reſiduum* of his real and perſonal eſtate to the ſaid *Catherine Carr* and *Sarah Sabbarton.* * P 334

Joſeph Sabbarton the teſtator died; and afterwards the marriage between the ſaid *Benjamin S.* and *Catherine Carr* took effect. Then *Benjamin* died, and afterwards

wards *Catherine*, without leaving any iſſue, *Catherine* having firſt made her will, and one of the defendants her executor. *Sarah*, the teſtator's ſiſter, alſo died without leaving any iſſue, ſhe having firſt intermarried with one of the defendants, who is her adminiſtrator. *John Sabbarton* the brother died in the life-time of *Catherine Carr*, leaving two
* P 335 ſons *Joſeph* and *Benjamin*, both of whom were then twenty-one years old and upwards. And *Joſeph* the eldeſt ſon is dead, leaving iſſue only one child *Jane*, an infant, now living; who by her next friend has brought a bill for a moiety of the bank-ſtock, which, with the money in the orphans fund, remains in the ſame condition it was at the time of making the will.

The queſtion propoſed by the court of Chancery was, whether the bequeſt of the perſonal eſtate in the bank and orphans fund [which that court directed ſhould be conſidered as a term of years in land] to the child and children of *John Sabbarton* that ſhould attain the age of twenty-one years, be good or not, under the circumſtances which have happened.

And this point was argued laſt *Eaſter* term by Mr. *Chute* for the plaintiff, (who claimed under the bequeſt to the child and children of *John*) and by Mr. *Filmer* for the defendants, (*viz.* the executor of *Catherine*, &c.) and this term it was again argued by ſolicitor general *Strange* for the plaintiff, and ſerjeant *Eyre* for the defendants.

On the part of the plaintiff it was argued, that in this caſe two queſtions are proper to be conſidered; (1) How the law now ſtands concerning executory deviſes as to terms of years. (2) Whether the preſent bequeſt can be ſupported upon thoſe grounds. As to the firſt point, the hiſtory of executory deviſes is now thoroughly underſtood; and therefore it is needleſs

needleſs to trace them to their fountain-head. It is ſufficient to ſay in general, that for the conveniency of farmers and leſſees, who are poſſeſſed of terms of years, this kind of deviſe is now greatly favoured, and carried much further into execution than formerly. Originally they begun in the caſe of truſts in equity, but they are now extended to legal intereſts, and are good in all caſes, unleſs it be in ſuch where they induce a perpetuity. Now that is a perpetuity where an eſtate is abſolutely unalienable, though all mankind join in the conveyance: *And it is greatly disfavoured, becauſe it prevents the fluctuation of property, which in a trading country is attended with great inconveniences. An executory deviſe hath therefore certain limits ſet to it: At firſt it was confined to a ſingle life in being; afterwards it was enlarged to a number of concurrent lives in being, becauſe in effect this is but for the life of one perſon, *ſcil.* the longeſt liver of them. In the caſe of *Lloyd* and *Carew*, (*a*) in the houſe of lords, it was enlarged to one year after a life in being; and in *Maſſenburgh* and *Aſh*, (1 *Vern.* 234, 257, 304.) to twenty-one years after a life in being; which is the furtheſt ſtep it has yet proceeded. (2) As the law therefore now ſtands, the bequeſt under which the plaintiff claims is good, there not having been any exiſting eſtate reaching further than the lives of two perſons *in eſſe* at the ſame time; at the end of which the whole term muſt have become veſted in ſome perſon or other. If *Benjamin* and *Catherine* had happened to have had either a ſon or daughter, by the deviſe to ſuch iſſue in tail the intire term would have been veſted in them, and there would have been an end of all further limitations: And the law will certainly wait till it be ſeen whether the ſurvivor of two perſons in being ſhall leave any iſſue or not.

* P 336

(*a*) Show. P. C. 137. Prec. Cha. 72. Fearne. 317. 318.

Fearne. 407.

Here

Here both *Benjamin* and *Catherine* died without iſſue, ſo that upon their deaths the contingency was at an end: And as the children of *John* were both twenty-one years old at the time of his deceaſe, (which was in the life of *Catherine*) there was no need of any waiting on the account of age. It cannot reaſonably be objected, that *Benjamin* and *Catherine* took an eſtate-tail by force of the words [and for want of iſſue male]; for an eſtate for life is expreſly given to *Benjamin* and *Catherine*; and thoſe words are deſcriptive only, and plainly refer to their firſt and other ſons, and ought not by implication to be extended to them. *Sav.* 75. S. C. *Cro. El.* 40. After the deviſe to the ſons, the lands are given to the daughters of *Benjamin* and *Catherine*, without any words of inheritance: And this ſhews an uniformity of intention in the teſtator, that their ſons and daughters ſhould have the whole term, though the *limitations to them be differently expreſſed. It is further ſaid in the will, [and if there ſhall be no iſſue of the ſaid marriage] the meaning whereof is, "if there ſhall be "no daughters": For the word [iſſue] is a good word of purchaſe. 1 *Salk.* 224. The words afterwards are, [if neither of them the ſaid *Benjamin* and *Catherine* ſhall leave any lawful iſſue.] Now this muſt neceſſarily have happened at the time of their deaths; to which the word [leave] properly refers; and therefore this materially differs from a limitation upon a dying without iſſue; in which caſe a deviſe over is void, becauſe that contingency may never happen, or not till after a long ſucceſſion. Beſides, though in the caſe of a freehold the words [if he dies without iſſue] create an eſtate-tail; yet otherwiſe it is in the caſe of a term of years, becauſe here the whole term goes to the party's repreſentative; and therefore theſe two caſes are to be conſidered in a different light. Upon the whole therefore, as the

* P 337

V. Fearne Conting. Rem. 363, &c.

intire

intire term never became veſted in any perſon, but it veſted in poſſibility only, which never took effect, the deviſe over to the children of *John* is good. And to this point the following caſes were cited: *Higgens* and *Darby*, (*b*) *Salk.* 156. S. C. 2 *Vern.* 600. *Targett* and *Gant*, (*c*) *Abr. Ca. Eq.* 194. *Martin* and *Long*, 2 *Vern.* 151. S. C. *Abr. Ca. Eq.* 192. *Stanley* and *Leigh*, (*d*) at the Rolls, 16 *July* 1734. *Dorothy Leonard* deviſed a term of years to *Francis Leigh* for life, and after his death to the eldeſt ſon of *Francis Leigh* and the heirs male of ſuch eldeſt ſon; then to the ſecond and other ſons of the ſaid *F. L.* in the ſame manner; and in default of ſuch iſſue, to his daughter and daughters, equally to be divided between them: and in default of daughters, or in caſe of their death before twenty-one or marriage, then to the plaintiff. *Francis L.* died without iſſue. And it was held by Sir *Joſeph Jekyll*, maſter of the Rolls, (1) That the limitation to the plaintiff was good, becauſe it did not tend to a perpetuity: For that it would be ſeen at the death of *F. L.* whether he ſhould leave a ſon or daughter, or not. (2) That if *F. L.* had left a child at the time of his death, the whole term would have become veſted in *ſuch child, and it would have been tranſmiſſible to his repreſentative. And the maſter of the Rolls cited *Higgens* and *Darby* as in point. *Gore* and *Gore*, (*e*,—*Brook*, and *Taylor*, (*f*) (1731.) That was a caſe ſent from the Chancery, by lord chancellor *King*, for the opinion of this court; and it was this: A term of years was deviſed to the teſtator's daughter *Mary* for life, and after her death to the fruit of her body, with a remainder over. *Mary* died without iſſue; and the opinion of this court was, that the limitation over was good, becauſe it muſt be determined upon *Mary*'s death who ſhould take the

(*b*) or *Dowler*, 2 P. W. 694. 1. P. W. 98.
(*c*) Gilb. Eq. Ca. 149. 1 P. W. 432.
(*d*) 2 P. W. 686.

* P 338

(*e*) 2. P. W. 28. 9 Mod. 4. 2 Kel. 254. 2. Barnard. B. R. 209. 229. 355. 2 Strs. 958. 10 Mod. 501.
(*f*) Moſel. 183. 2 Eq. ab. 367.

the term. And the court of Chancery afterwards was of the ſame opinion. *Blew* and *Marſhall*, (g) in Chancery, *Auguſt* 1732. A perſonal eſtate was bequeathed to *A.* for life, and afterwards to ſuch children as ſhe ſhould leave at the time of her death who ſhould attain the age of twenty-one; and the limitation over was held good.

(g) 3 P.W. 381. S. C. not S. P.

V. *Clere* v. *Clere*. Cas. T. Talb. 21. S. P.

On the other ſide it was argued, that this caſe depends upon the words of this will, and upon the ſtate in which things were at the time of making it: For if ſubſequent accidents are to be taken into conſideration in theſe caſes, it would produce much confuſion, and no limitation would be void in its creation. *Swinb. part* 7. *cap.* 11. Now here both the real and perſonal eſtates are given by the ſame words; which plainly ſhews the intention of the teſtator to be, that they ſhould go together. With reſpect to the freehold premiſſes, an eſtate-tail paſſes thereby to *Benjamin* and *Catherine*, notwithſtanding the limitation be to them for life: For the words [if neither of them the ſaid *B.* and *C.* ſhall leave any iſſue] are words of limitation, and mean the ſame as if it had been ſaid, [for default of ſuch iſſue]. If there be indeed any difference between theſe two expreſſions, it ſeems to be in favour of the defendants, becauſe the firſt ſeems to refer to the time of the party's death, but the other hath no ſuch relation, but may properly extend to the end of the world. As to the word [iſſue], this is a collective term, and takes in the whole generation, according to lord *Hale*'s opinion in the caſe of **King* and *Melling*: And it is plain by the penning of this will, that the preſent teſtator knew the difference between the words [iſſue] and [children], and between the expreſſions of [dying without iſſue] and [when iſſue ſhall fail.] *Love* and *Windham*, 1 *Lev.* 290. *Higgens* and *Darby*, *Salk.* 156.

* P 339

1 Vent. 228.

156. *Langley* and *Baldwin*, (cited in *Mod. Ca. in Law and Eq.* (*b*) 258, 384.) That was a caſe ſent out of Chancery for the opinion of the court of Common Pleas 1707. and was thus: Lands were deviſed to *Jonathan Langley* for life, with a power to make a jointure, remainder to his firſt and other ſons unto the ſixth ſon in tail, and if he died without iſſue, remainder over. And it was held, that *J. L.* took an eſtate-tail. *Shaw* and *Weigh*, (*i*) in the houſe of lords, 1729. *A.* deviſed lands to his wife for her life, then to truſtees, in truſt for his two ſiſters during their natural lives, diſpuniſhable of waſte; and if either of the teſtator's ſaid ſiſters ſhould have iſſue, in truſt for ſuch iſſue of the mother's ſhare, or elſe in truſt for the ſurvivor of them and her iſſue; and if both ſhould happen to die without iſſue, and their iſſue to die without iſſue, then the teſtator deviſes the premiſſes in remainder over. And it was held, that the two ſiſters had an eſtate-tail. As therefore in the preſent caſe an eſtate-tail in the freehold lands paſſed to *B.* and *C.* the whole term in the leaſe-hold conſequently became veſted in them, becauſe the ſame words muſt neceſſarily have the ſame meaning: And this will plainly appear by the caſes after cited. But ſuppoſing that the whole term was not veſted in *B.* and *C.* the limitation to the children of *John* is void, becauſe it is to take place after ſeveral contingencies, which are too remote; for, as appears from what is before mentioned, that deviſe was not to take effect till after a failure of iſſue by *B.* and *C.* *Dyer* 7. 1 *Roll.* 611. 1 *Mod.* 114. *Duke of Norfolk's caſe*, 3 *Chan. Ca.* *Love and Windham*, 1 *Lev.* 290. S.

(*b*) i. e. 8 Mod. S. C. 1 Eq. ab. 185. but ſee 1 P. W. 759. 1 Veſ. 26.

(*i*) 1 Eq. ab. 184. 8 Mod. 253. 382. Fitz-G. 7. 2 Stra. 798. Fort. 58.

C. 1 *Mod.* 50. S. C. 1 *Sid.* 450. S. C. 1 *Vent.* 79. 3 *Lev.* 22, 23.*

* It appears from Cas. T. Talbot. 250. that the Court of B. R. certified that the limitation [considered as of a term] to the children of J. S. was good in the case that had happened.—See several cases on this point referred to by Mr. *Cox* in his notes to *Higgins* v. *Dowler*. 1 P. W. 98. and *Atkinson* v. *Hutchinson*, 3 P. W. 258. Also 1 Bro. Cha. Rep. 293. Ambler. 72. 122. 2 Blackst. 704. 1 Term Rep. B. R. 593. 3 Term Rep. B. R. 143.

Scudamore against *Hearne and his wife.*

To debt on bond against an administrator, he pleads judgments obtained in the Sheriff's Court of *London*, on suits commenced after the present suit, for simple contract debts of the intestate a citizen to citizens; alleging a custom for debt lying thereon in the Sheriff's Court. Plea held bad, for not averring that the administrator was bound to pay such debts as if due on bond.

DEBT on bond against the defendants as administrators: To which they plead, that there is a custom in *London*, that if one citizen of *L.* becomes indebted to another citizen of *L.* upon a simple contract, and remains so indebted at the time of his death, an action of debt will lie thereon in the sheriff's court against his administrator as upon a *concessit solvere*; and they aver, that one of the defendants and the intestate were citizens of *L.* and the intestate was indebted within the city, *&c.* and then they plead several judgments recovered in the sheriff's court of *L.* for the said debts, *&c.*

And upon a demurrer to this plea it was objected by Mr. *Denison*, that the custom intended by the defendants is not well set out, it being stated only, that an action of debt lies against administrators for a debt due on a simple contract as on a *concessit solvere*; whereas this is not sufficient to give the simple-contract

tract debt any kind of priority, unleſs it be added, "that the adminiſtrator is bound to pay it as if it "was due on obligation." *Snelling's caſe.* 5 *Co.* 82. *b.* (*a*) The conſequence hereof is, that as it appears on this record, the ſuits in the ſheriff's court were brought after the preſent action, whereby notice was given of the plaintiff's demand, this muſt be paid preferably to the judgments here pleaded. But it was ſaid by Mr. *Deniſon*, that if an executor ſuffers judgment for a ſimple-contract debt of his teſtator, he may diſcharge this though there be a bond-debt, unleſs he had previous notice thereof. [But *per Chapple* juſt. it has not yet been carried ſo far as this; but where the judgment is by compulſion,† and there is no notice of the other debt, the judgment may be ſatisfied: And ſo it was determined in *Magworth* and *Davies*, (*b*) in *C. B.*]

(*a*) Which is not Law, *per* Holt. 1 Ld. Ray. 57.

V. 1 Term Rep. B. R. 690. 3 Lev. 115. 1 Mod. 175. 3 Mod. 115. Vaug. 94.

(*b*) *Davies* v. *Manſhouſe.* Fitz-G. 76. Bull. N. P. 178.

*In the principal caſe *Lee* C. J. alſo objected, that it is not ſhewn in the plea the contract was made within the city, it being ſaid only, that the inteſtate was indebted to the party within the city: So that (for aught appears) the contract might have been made elſewhere. And this, he ſaid, is a ſtrong exception. * P 341

And Mr. *Deniſon* informing the court that he had acquainted ſerjeant *Draper*, who was counſel on the other ſide, with the exception now taken by him, and that the ſerjeant had refuſed to defend the plea, judgment was given for the plaintiff.

† See this diſtinction of *Chapple's* J. over-ruled by Lord *Hardwicke* in *Hawkins* v. *Day.* Ambler. 162.

S. C. 2 Stra. 1107.

Archer, on the demiſe of Hankey againſt *Snapp.*

The purchaſer of the equity of redemption is intitled to ſtay proceedings in an ejectment brought by the mortgagee, on paying the mortgage debt and without paying a bond debt due by the mortgagor to the mortgagee before the purchaſe, and whereof the purchaſer had notice.

A Motion having been made laſt term for ſtaying the proceedings in an ejectment brought upon a mortgage, on the payment of principal, intereſt and coſts; and it being then referred to the maſter, as uſual, his report was now moved for by ſolicitor general *Strange:* And the caſe was reported to be this:

Thomas Pollard made a mortgage to the leſſor of the plaintiff for 430*l.* and afterwards borrowed of him 80*l.* and 32*l.* for which he gave his bond only. The defendant *Snapp* afterwards purchaſed of *Pollard* the equity of redemption of the mortgaged lands for 600*l.* but retained thereout 112*l.* and gave a bond to *Pollard* (wherein ſo much is recited to be due to *Hankey* on bond) for paying to *Pollard* 112*l.* if he could redeem the premiſſes without diſcharging *Hankey*'s ſaid bond-debt; and if not, for paying the money to *Hankey*. And an action hath been ſince brought by *Hankey* againſt *Pollard* for the 112*l.* due on the bonds; and a judgment obtained therein, with a *ceſſet executio.*

* P 342 *Upon this report it was inſiſted by Mr. ſolicitor for the leſſor of the plaintiff, that the proceedings ought not to be ſtayed without *Pollard*'s paying as well the bond-debt as the mortgage-money, it being an eſtabliſhed maxim, that where a perſon applies for equity, he muſt do it. And the aſſignee of the equity of

of redemption ſtands on the ſame footing with the original mortgagor, eſpecially as he had here previous notice of the bond-debt; and alſo took a ſecurity on that account, by retaining the money in his hands. *Abr. Ca. Eq.* 324. 2 *Vern.* 177, 691, 698.

On the other ſide it was argued by Sir *Thomas Abney*, and Mr. *Barnardiſton*: And they cited *Abr. Ca. Eq.* 325. and *Wood, on the demiſe of Cowhurſt*, and *Mortimer and others, Hil.* 1 *G.* 1. in this court. One *Millward* there mortgaged a copyhold eſtate to the leſſor of the plaintiff, and afterwards took up of him a further ſum upon bond: And a motion was made, and a rule granted, for ſtaying the proceedings in ejectment, and delivering the evidences to the heir of the mortgagor, on his payment of the mortgage-money and coſts.

And in the principal caſe it was reſolved by the whole court; (1) That where an eſtate is mortgaged, and afterwards money taken up by the ſame perſon on bond, the mortgagor is not obliged upon ſuch an application as the preſent to pay the bond-debt, becauſe in his hands it is no lien on the lands, as a judgment is; for if he was, by the ſame reaſon he would be obliged to pay even ſimple-contract debts. But in ſuch caſe the heir is obliged to diſcharge the bond-debt, as well as the money due on the mortgage, in order to prevent circuity of action: And ſo it is where ſeveral ſums are lent on ſecurities of a like nature: as firſt upon perſonal pledges, and afterwards on a note; according to the caſes cited out of *Vernon's Reports*: Becauſe in this caſe the executor is in the ſame ſituation as the heir in the other. (2) In this caſe the purchaſer is in the ſame condition as the original *mortgagor would have been if no purchaſe had been made, as he had notice of the bond-debt; But then

1 Vern. 244. Vide Prec. Ch. 407. 1 Will. Rep. 776. 2 Atk. 53. 2 Vel. 662.

Bingham v. *Gregg.* *Barnes.* 182. *Felton* v. *Aſh.* Barnes. 177

* P 343

as

as the mortgagor himſelf would not be liable to the bond-debt, the purchaſer cannot be ſo. And his retainer of the money, and giving the bond makes no difference, the bond being given conditionally, and founded on the very queſtion now in agitation, and conſequently not fraudulent: Otherwiſe perhaps it would be, if the retainer had been general for paying the bond-debt, becauſe then it might be conſidered as part of the agreement, that the money ſhould be applied in diſcharge of the bond.

7 Geo. 2. V. Stra. 413.

Lee C. J. alſo ſaid, that before the ſtatute this court exerciſed this diſcretionary power, as well in the caſe of a mortgage, as of a forfeiture for non-payment of rent; in both of which caſes the court, according to the rules of equity, did ſtay the party from proceeding at law, by compelling him to take the money really due to him.

The King againſt *Harman and others.*

A *Certiorari* lies to remove orders appointing, or convicting overſeers though no appeal has been brought; one *Certiorari* lies to remove ſeveral orders, if they relate to the

A *Certiorari* having been granted for the removal of ſeveral orders for appointing overſeers, and alſo for convicting the perſons ſo appointed for refuſing to act in the office, a *ſuperſedeas* was now prayed by Sir *Thomas Abney* to this *certiorari, quia erronice emanavit:* And he argued, that an appeal lies in this caſe, by *ſect.* 6. of 43 *El. c.* 2. and a *certiorari* doth not lie till an appeal is brought, for that the party cannot paſs over a ſeſſions *per ſaltum*, *Salk.* 147. *Farr.* 10. 6 *Mod.* 40. And in the ſame perſons, and the ſame matter.

caſe

caſe of *The King* and *the inhabitants of Warwick*, (a) lord *Hardwicke*, chief juſtice, ſaid, that where an appeal lies, a *certiorari* granted may be taken off the file.

(a) 2 Stra. 991. Cunn. 99.

Sir *Thomas Abney* alſo objected, that in this caſe, there being ſeveral orders, there ought to have been more than one *certiorari*.

*But it was held by the whole court, that where an order of juſtices is made, and there is but one party who hath a right to appeal, (as in the caſe of orders of appointment, and of orders made upon an overſeer's abſence or negligence in the execution of his office) and he waives his privilege of reſorting to the ſeſſions, and elects to come to this court, a *certiorari* lies for removing the orders, there being no reaſon againſt the party's being received: For the authority of this court is never taken away by an act of parliament, without ſpecial words therein for that purpoſe. But where there are two parties having a right to appeal, and the time of appealing be fixt by the law, (as in the caſe of ſettlements, where the time is limited to the firſt ſeſſions) it is not reaſonable to grant a *certiorari* till the time is elapſed: And ſo is the rule in *Salk.* 147. to be underſtood. And in the preſent caſe, there being no time ſet for appealing, if it be a ſufficient objection to a *certiorari* that an appeal lies, a *certiorari* can never be granted.—— *Lee* C. J. alſo ſaid, there may be caſes ſo circumſtanced, where a *certiorari* hath been and ought to be denied; and ſuch was the caſe cited of *The inhabitants of Warwick*, where a *certiorari* was prayed pending a ſeſſions, and the party had made his election by appealing thereto. And he ſaid, that he would not aſſert, an appeal does not lie as well upon an order for refuſing to act as overſeer, as on an order for negligence in the office; the words of the ſtatute being very general.

* P 344

2 Bur. 1042.—1 Blacſt. 231. S. C.—3 Bur. 1458. Cowp. 524.

As

As to the other objection, the court ſaid, there is no weight in it; as all the orders removed relate to the ſame perſons, and the ſame matter. The motion was therefore denied.

V. *Rex* v. *Stanley*. Cald. 172.

S. C. Bur. S. C 125. * P 345

The King and *the inhabitants of Sowton in Devonſhire.*

Reſidence for 40 days in the pariſh, wherein a man has an eſtate of his own (*except it be by purchaſe under* 30*l.*) is ſufficient to gain a ſettlement; though it be not on the eſtate or ſucceſſive. It gains a ſettlement alſo for his children, they not having gained a ſettlement of their own, but remaining part of his family though living elſewhere.

AN order of juſtices was made for the removal of *Thomas Willes* and his wife, and their children, from *Sowton* to *Sidbury*; which order upon appeal was ſet aſide: And the caſe appeared upon the ſeſſions order to be this:

Thomas Willes the pauper rented an eſtate in *Sowton* at the rent of 10*l.* *per ann.* and being diſtrained for the ſaid rent, he left the eſtate, and having an eſtate in his own right for a term or terms of years of the value of 19*l.* 10*s.* *per ann.* in *Sidbury*, he went there, taking it for his houſe or habitation; And the ſame being in the poſſeſſion of an under-tenant, in conſideration of 8*l.* paid by the tenant, the pauper accepted a ſurrender of his leaſe, and had the keys of the houſe delivered to him, and took poſſeſſion of the eſtate. He continued at *Sidbury* from *November* to *April*, and occupied the eſtate during that time, cutting the hedges, weeding the ground, and ſowing turnips therein; but he paid no taxes, and had no ſtock on the lands, nor had any goods, not ſo much as bedding, in his houſe at *Sidbury*, but lodged at a publick houſe there as a gueſt or traveller, without having

having a particular room aſſigned to him. During the pauper's ſtay at *Sidbury*, he continued there forty days in the whole, but not ſucceſſively and altogether; and went frequently to *Sowton* to ſee his wife and children, who were left behind, and remained at *Sowton*, where he ſtayed ſometimes a week at a time: And he went to other places about his affairs, and was at other places for ſo long a time as at *Sidbury* during the ſaid five months. Afterwards in *April* the pauper ſold his eſtate, and went back to *Sowton*, from whence he was removed by the juſtices order to *Sidbury* with his wife and children, the youngeſt of whom was about eight, and others about twenty or thirty. But it *was not ſtated that any of them had gained any ſettlement of their own. * P 346

And it was moved laſt term by ſerjeant *Huſſey* to quaſh the order of ſeſſions, and to confirm the original order; and he argued, (1) That the father was well removed by the firſt order to *Sidbury*: For a perſon by living upon his own eſtate gains a ſettlement, although he continues there for a few days only; and this not by any act of parliament, but by conſtruction of law, becauſe no one ſhall be deprived of or removed from his property. In the caſe of *The pariſhes of Walton* and *Montpealy*, *Mich.* 2 *G.* 1. it was laid down as a general rule by *Parker* C. J. that by coming to and dwelling upon an eſtate of his own for forty days, a perſon gains a ſettlement. And in the caſe of *The pariſhes of Eaſt-Goodaway* and *Muncleve*, *(a)* it was held, that a certificate-man, who came and lived upon a copy-hold eſtate which he had in the right of his wife, gained thereby a ſettlement. In the preſent caſe the pauper's intereſt in the eſtate appears to be a beneficial one, it being ſtated, that he had it for a term or terms of years in his own right; that it was of 19*l.* 10*s.* *per ann.* and that he ſold

(a) Stra. 163. V. Bur. S. C. 468. Cas. Set. & Rem. p.

ſold it. Beſides, the court will intend it to be a beneficial intereſt, unleſs the contrary appears. *The Pariſhes of Heaver* and *Sunbridge in Kent*, (b) *Trin.* 8 *Geo.* 2. It was there ſtated, that the father of *T. G.* the pauper had an eſtate for ninety-nine years, which he held at the rent of 5*s. per ann*, and he deviſed it to *T. G.* upon condition to pay 20*l.* to his mother, if ſhe ſhould live long enough to ſpend the ſame: And it was determined by lord *Hardwicke*, that the intereſt ſhall be intended to be of a beneficial nature. As to the time of the pauper's reſidence at *Sidbury*, it is mentioned to be five months; and though he was abſent for ſome part of the time, this is not material; a reſidence for forty days in the whole, and not ſucceſſively, being within the ſtatute. He was certainly a commorant, for the purpoſe of attending the leet. And as to the manner of his reſidence, it appears that he cultivated the eſtate, and took it for his home; ſo that it was *ſuch a reſidence from whence the pauper could not be removed, and conſequently was ſufficient to acquire a ſettlement. It has been held, that if an apprentice is bound in one pariſh, and lodges in another, he gains a ſettlement in the place where he lodges. And it appears by the 13, 14 *Car.* 2. *cap.* 2. *ſect.* 1. that a ſojourner may gain a ſettlement. With reſpect to the value of the eſtate, it is worth 19*l.* 10*s. per ann.* and conſequently above 30*l.* and therefore this caſe falls within the ſtatute of 9 *G.* 1. *c.* 7. (2) In the preſent caſe the ſettlement of all the children attends that of the father, they being a part of his family. *The Pariſhes of* ——— and *Marſton*, *Trin.* 1 *G.* 1. There the father, after gaining a ſettlement in one pariſh, acquired a new one in another, by renting an eſtate there, but left his children behind him, and afterwards died. And it was held, that the children were

(b) Bur. S. C. 7.

* P 347

were ſettled in the laſt pariſh. But otherwiſe it is in the caſe of a mother; as it was determined in *The Pariſhes of St. Catherine near the Tower* and *St. George in Southwark.* (c) The caſe cited is contra.

(c) 2 Lord Raym. 1474. Fort. 218. Foley 291. Bur. S. C. 49. 65. V. *Rex* v. *Woodend.* Fort. 328. 2 Ld. Ray. 1473. Foley 256.

Upon the whole matter therefore, the father and children were well removed, by the original order, to *Sidbury.*

On the other ſide it was objected by Mr. *Gundry* to the ſettlement of the father at *Sidbury*; (1) That his intereſt in the eſtate does not appear to be ſufficient for this purpoſe: For it is only ſtated to be a term or terms for years, without mentioning the number of years, or whether it was a beneficial intereſt, or how the pauper came by it, whether as executor or adminiſtrator, or as a purchaſer. And if it was by purchaſe, this ſhould have been ſhewn to have been made before the act of 9 *G.* 1. or if the purchaſe was made ſince, the conſideration-money ſhould have appeared to be 30*l.* or upwards. Now none of theſe circumſtances can be ſupplied by intendment, as in the caſe of renting a tenement, where it is not ſet out to be of 10*l. per ann.* this ſhall not be preſumed. And ſo it is where notice is required, and it be ſtated *only, that a perſon came to reſide in a pariſh, without ſhewing that he gave notice. *Salk.* 472. (2) The manner of the pauper's holding the eſtate is not ſufficient for the gaining a new ſettlement, as it appears by the circumſtances hereof that he did not intend to reſide at *Sidbury.* *Salk.* 524. S. C. 5 *Mod.* 416. Neither was his ſtay there long enough for that purpoſe, for it is ſtated, that he did not continue at *Sidbury* for forty days ſucceſſively, and that he was for as much of the five months at *Sowton* as *Sidbury.* He might not perhaps be abſent from *Sowton* for forty ſucceſſive days: And it is as reaſonable that ſo ſhort and broken an abſence ſhall not avoid a ſettlement, as that a reſidence, for the ſame time and

* P 348

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in the ſame manner, ſhall gain one. Upon the old law, a reſidence for forty days was neceſſary for a perſon to attend court-leets. And on the ſtatute of *Car.* 2. an inhabitancy for forty days is neceſſary, though it muſt be admitted that theſe need not be ſucceſſive.

But ſuppoſing the father was well removed to *Sidbury*, the children were not, becauſe they are all above the age of nurſe-children: And the reaſon why nurſe-children ſhall follow the ſettlement of the parent is, becauſe they ſtand in need of his care; which does not extend to the preſent caſe. *Salk.* 470, 482, 528. *The Pariſhes of Eaſt-Goodaway* and *Weſt-Goodaway*, (*d*) *Trin.* 7 *G.* 1. *The Pariſhes of St. Michael in Norwich* and *of St. Margaret* (*e*) *in Ipſwich*, *Eaſt.* 2 *G.* 2.

(*d*) Stra. 438.

(*e*) St. *Mathews.* 2 Stra. 831.

Lee C. J. The pauper had certainly no ſettlement at *Sowton* if he obtained one at *Sidbury*, which is the point in queſtion. And to determine this it is proper to be conſidered; (1) Whether it appears he had ſuch an intereſt in the eſtate as was properly his own, and contra-diſtinguiſhed to a rack-rented eſtate. The caſe is not ſtated ſo fully as it ſhould have been; for it ſhould have been ſhewn by what title the pauper came by the eſtate, whether by act of law as an executor, or by deviſe or purchaſe, or in what other manner. As this is not done, we *cannot intend that he was a purchaſer thereof, and conſequently this caſe does not fall within the late act. However, upon the circumſtances ſet out in the ſeſſions order, the eſtate does ſeem to be of a beneficial nature, and the pauper is mentioned to have had it in his own right, and conſequently the *quantum* of the value is not material, becauſe the owner has a right to be where his eſtate lies; And ſo it has been determined. (2) The next matter to be conſidered is the pauper's

* P 349

reſidence

reſidence at *Sidbury*. It is rightly admitted at the bar, that it is not neceſſary, upon the ſtatute of *Car.* 2. the continuance ſhould be for forty days ſucceſſively. In the caſe of *The Pariſhes of Edgware* and *Harrow, (f) Eaſt.* 12 *Ann.* it was held, that a reſidence for forty days, where the party is irremovable for that time, gains a ſettlement. And upon the old law, when a man came to a place, on the firſt day he was regarded as a ſtranger; on the ſecond, as a gueſt; and on the third, as an inhabitant: And a place of ſettlement, (which is a modern term, and has ariſen from the acts of removal) is a place of habitation. Now in this caſe it is plain from what is ſaid under the former head, that the pauper was irremovable whilſt he was at *Sidbury*; and though he lodged at a publick houſe, this is not very material, becauſe a man may have 100*l.* a year in a pariſh, and no houſe there. And the reaſon of his going to *Sowton* and other places is mentioned to be for the purpoſe of ſeeing his family, and about his affairs. Objected, That the party's ſettlement at *Sowton* was not determined, becauſe it does not appear he was abſent from thence for forty ſucceſſive days. Anſwer: This point depends on the queſtion, whether he was long enough at *Sidbury* to gain one there; for if ſo, then he loſes his former ſettlement at the other place. Upon the whole therefore, we muſt take the eſtate to be a beneficial intereſt, and the property of the pauper. And his reſidence at *Sidbury* was ſuch as is ſufficient to gain him a ſettlement there.

(f) Bur. S. C. 8. Fort. 310.

V. *Rex* v. *St. Nyott*, Bur. S. C. 132.

*As to the other point, there has been ſome diverſity of opinion amongſt the judges, how far the ſettlement of children ſhall be derived from that of the father. In the caſe before cited of *Edgware* and *Harrow*, it was ſaid by *Parker* C. J. that a child

* P 350

cannot

cannot be ſent to the place of the father's ſettlement, unleſs the child hath been there; for that he derives a ſettlement from his father, not as he doth an inheritance, but by reaſon of his being in a place from whence he could not be removed whilſt he was with his father. But in the caſe of *The Pariſhes of Everſley* and *Blackwater* (*g*) where that objection was taken by Mr. *Reeve*, the court held, that a child may be ſent to the place of his father's ſettlement though he hath never been there; which was that caſe, but the child was only two years old. In the caſe of *The Pariſhes of Eaſt-Goodaway* and *Weſt Goodaway*, (*h*) *Trin.* 7 *G.* 1. where the child was of a conſiderable age, and parted from his father, it was held, that he could not be ſent to the place of his father's ſettlement: And ſo it was reſolved in the caſe of St. *Michael's*, *Norwich* and St. *Mathew's*, *Ipſwich*; (*i*) where the child had been twelve years parted from his father, and emancipated from him, and alſo married. This therefore is the true diſtinction, that where a child remains in his father's houſe, and has gained no ſettlement of his own, his ſettlement ſhall attend that of his father; but otherwiſe it is where he has been ſeparated from his father, and has gained a ſettlement of his own. The conſequence is, that as in this caſe the children have always continued in the father's family, and it is not ſtated that they have gained a ſettlement of their own, though ſome of them are twenty or thirty years old, they are ſettled where the father is. And the law is the ſame in the caſe of a mother as of a father.

(*g*) Fort. 320. 2 Ld. Ray. 1332. Stra. 580.

(*h*) Stra. 438.

(*i*) 2 Stra. 831. 1 Barnard 157. S.P. *Rex* v. *Bugden* Bur. S. C. 270. 2 Wilſ. 283.

The reſt of the court was of the ſame opinion with the chief juſtice, upon both points, and for the ſame reaſons. And therefore the order of juſtices was now confirmed, and the order of ſeſſions quaſhed.

Note;

*Note; The exception to the ſettlement of the children was over-ruled upon the firſt argument, but the order conſiſting of many circumſtances, copies thereof were then directed to be given to the judges, in order to conſider the other point. * P 351

Ray, adminiſtrator, &c. againſt *Liſter.*

DEBT upon two judgments, one of which was for 30*l.* and the other for 10*l.* 10*s.* and the plaintiff lays to his damage 10*l.* The defendant pleads payment, but on the trial made no defence, and the jury found for the plaintiff, and gave 30*l.* damages.

In debt, the verdict and judgment being for greater damages than thoſe laid in the declaration, the Court refuſe leave to amend the declaration.

And it was this term moved by Mr. *Taylor* to amend the declaration, by inſerting 40*l.* damages inſtead of 10*l.* and it was inſiſted by him, and ſolicitor general *Strange*, that this ought to be permitted, it being no alteration in the verdict or judgment, but in the declaration, and only of a ſingle word: And it tends to the furtherance of juſtice. And beſides, the miſtake is to be conſidered as the miſpriſion of the attorney.

But the whole court was clearly of opinion, that the matter prayed to be amended cannot be called the miſpriſion of the clerk, it being the demand, and conſequently the inſtruction, of the plaintiff; and therefore it cannot be altered. For the court hath no authority to increaſe the party's own demand; and the ſtatute of *H.* 6. (upon which this motion muſt be founded) hath been expounded to extend only

only to the plain apparent miſpriſion of the clerk, where he had ſomething before him to go by. The only way therefore for the plaintiff to have taken was, to have remitted ſo much of the damages as exceeded what is laid. The motion was therefore denied.

*P 352 **Note*; It was objected at the bar to this motion, that a writ of error has been brought, and therefore the plaintiff is too late in his application. To which it was anſwered, that he is ready to pay the coſts thereof, if the defendant will waive the writ of error; and this if he refuſes to do, then it appears the writ was brought for other errors. And Mr. ſolicitor ſaid, this was the common practice in the Common Pleas. And Mr. *Taylor* cited the caſe of *Creſs* and *Speed*, *Eaſt.* 10 *G.* 2. where a rule was granted accordingly. But in the principal caſe the court refuſed the motion, for the reaſons above mentioned.

See poſt. 384. the Court refuſed to allow a *remittitur* of 20*l.* of the damages, to be entered.

The King againſt *Dore.*

Upon affirmance of a conviction for deerſtealing the proſecutor's coſts are to be taxed as between attorney and client.

A Conviction againſt the defendant for deerſtealing, having been removed by *certiorari*, and affirmed in this court, it was moved by Mr. *Filmer*, that the coſts be referred to the maſter for taxation in an adverſary way; the defendant having given a bond for the coſts, purſuant to the ſtatute of 3 *W. & M. c.* 10. *ſ.* 6.

Againſt this it was argued by ſolicitor general *Strange*, that an affidavit having been made by the proſecutor that every penny ſet down in the bill of coſts

coſts hath been paid by him, he ought to be reimburſed the ſame, it being the deſign of the act, that the proſecutor ſhould have nothing to pay even to his own attorney: Whereas upon ſtrict taxations, many *items* are always diſallowed or leſſened.

But *per cur'*: Although the words of the act are, "full coſts and damages," yet the proſecutor ought not to have ſuch allowed as are unuſual or unreaſonable: And it is for the benefit of the defendant ‡ that an affidavit is required; the reaſon thereof being, that there may be ſuch *coſts as cannot be proved but on the oath of the proſecutor. And *Probyn* juſt. ſaid, that the bill ought to be taxed as between attorney and client. A rule was therefore granted for referring the bill to the maſter.

‡ Qu. Proſecutor? * P 353

Chambers's caſe.

S. C. 2 Stra. 1107.

MOTION for a writ of privilege for exempting *Charles Chambers*, clerk and vicar of *Dartford*, and a proprietor of lands within *Dartford Freſh Marſh* in *Dartford*, from ſerving the office of collector and expenditor for the ſaid level. And an affidavit was produced, that Mr. *Chambers* held the lands as vicar of *Dartford*; and that the ſame are glebe lands. And the motion was principally founded on Dr. *Lee's* caſe, 1 *Vent.* 105. S. C. 1 *Lev.* 303. S. C. 1 *Mod.* 282. S. C. 2 *Keb.* 693.

A clergyman is not compellable to ſerve the office of Collector and Expenditor to the Commiſſioners of Sewers.

On the other ſide it was argued by ſerjeant *Wright* and Mr. *Filmer*, that a clergyman is not exempted either by ſtatute or common law from the ſervice of this office. The ſtatute of *Magna Charta*, *c.* 1. con-

ſirms only ſuch privileges as clergymen had at common law; and the ſame thing is meant by lord *Coke* in his comment on this ſtatute, (*2 Inſt.* 3.) where he ſays, that clergymen are not obliged to ſerve any temporal office; as he ſeems to explain it in *2 Inſt.* 625. and therewith agrees the opinion of lord *Holt* in 6 *Mod.* 140. That ſtatute therefore does not extend to the preſent caſe, becauſe the office in queſtion ariſes from act of parliament. And it hath often been ſettled, that in reſpect of eccleſiaſtical poſſeſſions, perſons are not exempted from charges and offices created by act of parliament. They are bound by the ſtatute of *Winton*, the ſtatutes for repairing of bridges, and of watch and ward; notwithſtanding this laſt is a perſonal ſervice, and of a low and ſervile nature, and very laborious. *Style* 161, 162. *2 Roll.* 272. *1 Vent.* 273. S. C. *2 Lev.* 139. S. C. 3 *Keb.* *476. Clergymen frequently act as juſtices of peace, and in the commiſſion of ſewers. *Callis's reading on ſewers* 243. And they are compellable to act in theſe offices, becauſe the King hath a right to the ſervices of all his ſubjects. Their eccleſiaſtical revenues are alſo liable to all parliamentary charges as well as other eſtates, though the payment of taxes be a ſervice of tenure. As to the preſent office, it is one of high truſt; it is an office which tends to preſerve the property of the church, as well as other poſſeſſions; and it is for the benefit of the whole country: And conſequently it is a very proper office for a clergyman, and not beneath the dignity of his profeſſion to act in. It is alſo material, that by the ſtatute of 23 *H.* 8. *c.* 5. a power is given to the commiſſioners of ſewers to make expenditors, without any exception; and the words of the act are, "ac- "cording to their diſcretions." And the King himſelf is not exempted from this office; for in docks

* P 354

and

and yards it is exerciſed by the officers of the crown. As to Dr. *Lee*'s caſe, the reaſon given by one of the judges does not hold here: And as to the preſent point, it is only the opinion of one judge againſt another. Beſides, this office may be exerciſed by deputy; and then the reaſon of the privilege now claimed (as appears by the writ of privilege itſelf) falls, and the principal ſhall not be exempted. 1 *Lev.* 233. S. C. 2 *Keb.* 309.

An affidavit was therefore produced, that this office is exerciſeable by deputy: And alſo that it hath been the conſtant uſage for the commiſſioners of ſewers, ſince the year 1635. to appoint expenditors by turns; and that thirty-four clergymen have ſerved this office ſince the caſe of the archdeacon of *Rocheſter*, which was in the time of *Car.* 2.

In ſupport of the motion it was argued by ſolicitor general *Strange*, and Mr. *Chipping*, that the general rule is, that a clergyman being *Deo militans*, ſhall not be obliged to intermeddle in ſecular affairs. *F. N. B.* 175. 2 *Inſt.* 3. *And the whole tenor of the books is, that they are exempted from ſerving temporal offices, becauſe perſons of that profeſſion are ſuppoſed to be always engaged in their cure: And for the ſame kind of reaſon attornies are privileged perſons, they being ſuppoſed to be always attendant on the courts. *Cro. Car.* 389. 1 *Vent.* 29. S. C. 1 *Lev.* 265. There is no difference, as to the preſent point, between an office at common law and a ſtatute-office; as appears by 6 *Mod.* 140. and *The Queen* and *Henley*, (a) *Eaſt. Ann.* ——A *mandamus* was there prayed to elect an overſeer in the room of a widow woman, who had been choſen into the office; and a peremptory one was granted, becauſe women are excuſed from ſerving offices at common law, and by the ſame reaſon they ought not to be obliged to exerciſe

* P 355

(a) This ſeems to be the caſe reported 16 Vin. ab. 415.—But ſee on this point *Rex* v. *Stubbs* 2 Term. Rep. 395.

exercise these offices by statute. As to the act of *H.* 8, the power thereby given to the commissioners to appoint officers, is not an absolute one, but a power bounded by the law; for the words are, "doing "therein, *&c.* after the laws and statutes of the "realm, *&c.*" And at the time when that act was made, clergymen were not obliged to serve this office, and consequently are not so now. Neither can a deputy be appointed under this statute, because he cannot be fined. And it seems to be *petitio principii* to say that this may be done, because if a clergyman is not obliged to exercise this office, he need not make a deputy. Besides, he may not be able to procure one; and then must himself intermeddle in secular affairs, contrary to the above rule.

For these reasons, and upon the authority of Dr. *Lee*'s case, and 6 *Mod.* 140. the whole court (*Page* just. *absente*) were clearly of opinion, that Mr. *Chambers* is not compellable to exercise this office; the first case being directly in point, and standing upon both the reasons given in the books; and the other being contrary to the distinction taken between an office at common law, and under act of parliament. And *Lee* C. J. said, that the usage in this case hath no influence on the present question, for *the exemption being claimed as a privilege, any person intitled to it may certainly waive it if he pleases.

*P 356

A writ of privilege was therefore granted.

Marsh,

Marſh, executrix, &c. againſt *Jennedy.*

S.C. 2 Stra 1106. Bull. N. P. 332.

IN *aſſumpſit* the plaintiff declares, that whereas *A. B.* (her teſtator) in his life-time, at the ſpecial inſtance and requeſt of the defendant had drawn, peruſed and ingroſſed ſeveral deeds and writings, and done other buſineſs for the defendant as an attorney, and had alſo laid out 20*l.* for and on the account of the defendant, and that whereas ſince the ſaid teſtator's deceaſe, the plaintiff at the like inſtance and requeſt had laid out 20*l.* as executrix of *A. B.* in and about other buſineſs of the defendant, and in finiſhing the ſaid deeds and writings, the ſame having not been compleated by the ſaid teſtator, the defendant, in conſideration of the premiſſes after the ſaid teſtator's death, promiſed the plaintiff to pay her as well ſuch ſums of money as the teſtator ſhould deſerve for the ſaid buſineſs, and had been laid out by him as aforeſaid, as ſuch money as had been laid out by the plaintiff, *&c.* To this the defendant pleaded the ſtatute of limitations; and the plaintiff was thereupon nonſuited.

An executrix declares for work done and money laid out by her teſtator, and alſo for money laid out by herſelf as executrix in finiſhing the work left undone by the teſtator and is nonſuited; the defendant is intitled to coſts, for as to the latter demand the plaintiff might have recovered in her own right.

And it was moved laſt *Trinity* term by ſerjeant *Urling*, that the maſter be directed to tax the defendant his coſts. And he argued, that (by the ſtatute of *Glouc. c.* 1. 2 *H.* 8. *c.* 15. and 4 *Jac.* 1. *c.* 3.) in all caſes where the plaintiff is intitled to coſts, the defendant is ſo too when he prevails: And for a conſiderable time even an executor was obliged to pay coſts; though afterwards it was ſettled, that as he ſues only *en auter droit*, he is not within the ſtatute

tute of *H.* 8. and that this act must be taken in towards an exposition of the other statutes relating to costs. The reason of exempting executors from costs
*P 357 is, because they are *supposed to be not conusant of the rights of their testators. *Cro. Jac.* 229. Now in the present case the plaintiff sues for what is due to herself, and upon a contract made by herself; and therefore this does not fall within the reason before mentioned, nor the words of the statutes of *H.* 8. and *Jac.* 1. She need not have named herself as executrix, which is to be considered as surplusage; and the inserting some counts in the declaration relative to the testator is only an artifice to screen the plaintiff from costs. For these reasons the plaintiff ought to pay costs, even supposing that the money, if recovered, would have been assets. *Hutt.* 79. *Latch* 220. 1 *Vent.* 92, 109. *Jenkins & ux'* against *Plume*, *Salk.* 207. S. C. 6 *Mod.* 91. S. C. *Rep.*
‡ 11 Mod. *in temp. Ann.*‡ 135, 174, 256.

On the other side it was argued by solicitor general *Strange*, that the plaintiff ought not to pay costs, because the duty arose in the life-time of the testator. The original of the defendant's being liable is the retainer of the testator to do business for him as an attorney; and if he did not retain the testator, he is not liable to this action. All that the plaintiff hath done is the compleating the business begun and left imperfect by her testator as his executrix; and it is expressly alledged, that she laid out the money as executrix: So that this redounds to the benefit of the testator, and the money recovered in this action would have been part of the testator's estate; and the present action could not have been maintained in the plaintiff's name only.—
On this side were cited *Salk.* 207, 314. 6 *Mod.* 91, 181. *Pauler* and *Delander*, (*a*) *Trin.* 1 G. 1. Trover by an executor; and the conversion

(*a*) Cas. T. Hardw. 205. Stra. 682. 2 Stra. 785. S. P. *Hole* v. *King*, Comyn's Rep. 162. V. *Harris* v. *Hanne* Cas. T. Hardw. 204.

was

was laid in his own time: And upon conſideration of all the books it was held, that he ſhall pay coſts, becauſe he need not have declared as executor. *Portman* and *Caine*, (*b*) *Hil.* 12 *G.* 1. *in K. B.* Debt on bond by an executor, the condition of which (upon *oyer*) appeared to be, that the defendant ſhould not hunt in the teſtator's ground. Defendant pleaded performance, and the plaintiff aſſigns a breach, (*ſcil.* that the defendant hunted, &c.) in his the plaintiff's time. *Verdict for the defendant. And upon a motion to tax the defendant his coſts, the court was of opinion, that the plaintiff ought not to pay coſts, becauſe he was under a neceſſity of declaring as executor; and therefore denied the motion. As to the objection, that the count in the teſtator's name is here inſerted by artifice, in order to intitle the plaintiff to coſts; it was anſwered, that ſuppoſing this action to have been brought both in her own right, and alſo as executrix, the declaration would have been ill on demurrer. To which point *Lee* C. J. agreed.

(*b*) 2 Lord Raym. 1413. Stra. 682.

* P 358

But the court doubting of the principal queſtion, and the ſame depending upon the particular manner in which the declaration was penned, copies thereof were ordered to be delivered to the judges, and the caſe to ſtand over for the opinion of the court. And this was now delivered by the chief juſtice to the following effect.

In order to determine the preſent queſtion, it will be proper to inquire how the law ſtands as to the point of executors being obliged to pay coſts. The general rule is, that an executor-plaintiff ought not to pay coſts upon a nonſuit; and the reaſon is founded upon the words of the ſtatute of *H.* 8. agreeably to which the ſubſequent act of *Jac.* 1. hath been taken. Upon this reaſon a great ſtreſs was laid by Mr.

Mr. juſtice *Eyre*, in the caſe cited of *Pauler* and *Delander*; where he ſaid, that the foundation of excuſing executors from coſts is not that what they recover is for their own benefit, but it is that they are not within the words of the ſtatute of *H.* 8. which mentions "actions brought on contracts made between "the plaintiff or any other perſon," and "for of-"fences and wrongs perſonal immediately ſuppoſed "to be done to the plaintiff, *&c.*" Now where an executor is plaintiff, though the cauſe of action accrues to him as ſuch, yet if he need not name himſelf executor, he is liable to coſts. And ſo it was held in the caſe of *Nicolas*, *adminiſtrator of Wilbore*, and *Killigrew*, *(c)* *Hil.* 10 *W.* 3. *in C. B.* Action by an adminiſtrator of a ſoldier againſt the colonel for the arrears of *pay paid by the agent to the defendant after the ſoldier's death, as for money received for the plaintiff's uſe: And the plaintiff being nonſuited, the queſtion, was, whether he ought to pay coſts. It was urged by the defendant's counſel, that the plaintiff muſt pay coſts, as the action is brought for money received for his uſe ſince the inteſtate's death, and the naming him adminiſtrator is ſurpluſage; and that it had been often ſo determined. And *Treby* C. J. ſaid, that as the plaintiff hath counted for money received for his uſe ſince the inteſtate's death, the naming him adminiſtrator is nothing to the purpoſe; and it muſt be taken as it appears on the declaration. To which *Powel* juſt. agreed. The ſame point is laid down as a general rule by *Holt* C. J. in the caſe cited of *Jenkins and his wife* againſt *Plume*, 1 *Salk.* 207. The caſe indeed of *Eaves* and

(c) 1 Lord Raym. 436.

* P 359

S. P. Bangs v. Bangs, Barnes 119. Smith v. Barrow. 2 Term Rep. B. R. 477.

and *Mocato*, in *Salk.* 314.† (and which is cited in *Jenkins* and *Plowe* as an *infimul computaſſet*) is contrary to this: And I have ſeen a manuſcript report of the ſame caſe, which agrees with the report thereof in *Salkeld.* But it does not appear who were in court; and the determination ſeems to be a very extraordinary one. That caſe muſt not, I think, ſtand for law, it being directly contrary to *Jenkins* and *Plume*, which was ſubſequent to it; and alſo to *Nicolas* and *Killigrew*, which was before it: Both of which caſes are exactly agreeable. And herewith agrees the caſe of *Wallis* and *Lewis*, (*d*) *Mich.* 4 *Ann.* Action on the caſe as executor, wherein the plaintiff ſet forth, that the defendant was indebted to him for money of the teſtator's received by the defendant after the teſtator's death to his uſe, &c. and it was objected, that there was no *profert* of the letters teſtamentary. But *Holt* C. J. ſaid, that the declaration being grounded upon a promiſe made to the plaintiff himſelf, the naming him executor was ſurpluſage, and therefore there was no need of a *profert*: And judgment was given for the plaintiff. So in trover by an executor, where he declares upon his own poſſeſſion, and a converſion in his own time, he is ſubject to coſts; as it was held in *Pauler* and *Delander*, *Paſ.* 1 *G.* 1. and in ——— againſt *Shafto.* In actions brought upon an *infimul* *computaſſet* with the executor, there was ſome doubt formerly, whether he be liable to coſts; but it is now ſettled that he is not, becauſe the accounting with the executor doth not create any new duty. *T. Jones* 47. Upon theſe authorities it is very clear, that where an executor-plaintiff by his declaration ſhews a cauſe of action accrued to himſelf ſince the death of his teſtator, he is

† And 2 Ld. Ray. 865.

(*d*) 2 Lord Raym. 1215.

* P 360

is ſubject to coſts. And ſo it is where a plaintiff hath a cauſe of action as executor, and another cauſe of action in his own right. *Jones* and *Wilſon*, (e) *Mich.* 8 *Ann.* *Aſſumpſit* by an adminiſtrator; and he lays in one count a promiſe made to his inteſtate, and in another count a promiſe is laid as made to himſelf; defendant pleaded *non aſſumpſit*, and the plaintiff was nonſuited: And it was held, that he muſt pay coſts for all, becauſe the nonſuit goes to the whole. The caſe cited of *Portman* and *Caine* (which hath been very rightly cited) is certainly law, becauſe there the contract was made with the teſtator himſelf: And conformable therewith is 1 *Vent* 92. But theſe caſes are not contradictory to the others before cited.

(e) 11. Mod. 256.

The next matter to be conſidered is, whether upon the ſtate of the preſent caſe, and the above authorities, the plaintiff ought to be excuſed from coſts. Now here is no expreſs contract, but in the firſt part of the declaration there is a *quantum meruit*, and an *aſſumpſit* for buſineſs done, and money laid out by the teſtator. If this were all, the plaintiff would have been obliged to ſue as executrix, and conſequently would not be liable to coſts. But then ſhe goes on, and ſays, that ſhe laid out money herſelf after the teſtator's death, &c. Now this ſhe might have recovered in her own name, it being no contract between the teſtator and defendant, but only a *quantum meruit*; on which count ſhe could have recovered nothing but what was laid out by herſelf. It is indeed alledged, that the plaintiff laid out this money as executrix; but notwithſtanding this, and though the money recovered would have been aſſets, yet as ſhe would have been ſubject to coſts if ſhe had made herſelf plaintiff in her own right, *as ſhe might have
* P 361 done, ſhe ſhall not be excuſed from coſts now. So in trover, where the goods are taken out of the executor's

cutor's poſſeſſion, though after the recovery the damages will be aſſets, yet he is ſubject to coſts; as appears by the caſes before cited.

We are therefore all of opinion, that the defendant is intitled to coſts. And a rule was granted accordingly for the taxing them.

Note; Upon the firſt argument, the court inclined to be of opinion, that if a contract is made with a teſtator, and begun by him, and after his death is compleated by his executor, and it be one intire contract, the executor, in an action brought by him thereon, is not ſubject to coſts, becauſe the matter aroſe in the teſtator's time, and the executor was obliged to perfect it out of the aſſets, and is liable to an action if he does not. And *Chapple* juſt. put the caſe, where one undertakes to levy a fine, and dies before it be compleated, *&c.* But in the principal caſe the contract is not intire.

The King and *the inhabitants of Hareby.*

MOTION by Sir *Thomas Abney* to quaſh an order of juſtices for the removal of a pauper, becauſe there was no complaint ſet out therein: And this, he ſaid, had been held a fatal objection. To which it was anſwered by Mr. *Makepeace*, that it is only matter of form.

An order of removal muſt ſtate that a complaint was made to the juſtices. Ante 239.

But *per curiam*, (*Page* juſt. *abſente*) This is the foundation of the juriſdiction of the juſtices; and therefore they quaſhed the order.

See 2 Salk. 402. 5 Mod. 149. Foley 84. Comb. 35[illegible]. The order muſt ſtate that complaint was made by the Churchwardens or Overſeers.

Redway

*P 362 *Redway* againſt *Poole.*

Writ of Inquiry amended by making the return agreeable to the award of it. Ante 77.

MOTION by ſerjeant *Draper* to amend a writ of inquiry, by altering the return, and making it conformable to the award thereof upon the roll. And he argued, that there is no ſuch return as is mentioned in this writ; and here is ſomething to award by. And he cited *Salk.* 52. *Hammond* and *Gatliffe*, *Hil.* 11 *G.* 2. *in K. B.* and *Hughes* and *Alvarez*, there cited.

On the other ſide it was urged by Mr. *Deniſon*, that this is a void return, no day being given to the party.

But notwithſtanding this objection, the court gave leave to amend on payment of coſts.

S.C. Bur. S. C. 129. 28tra. 1110. Bott. 145.

The pariſhes of Woolſtanton and *Utoxeter in the county of Stafford.*

To the binding of a pariſh apprentice as ſtated in an order of ſeſſions, it is objected, 1ſt.

AN order of juſtices was made for the removal of a pauper from *Woolſtanton* to *Utoxeter*; which upon appeal was quaſhed: And the caſe, as ſet out in the order of ſeſſions, was this:

That it was ſtated that one of the indentures was ſealed "by J. S. overſeer of the poor;" whereas all the overſeers ought to have concurred. 2d. That the boy himſelf was no party to the indenture. 3d. That it did not appear for what time he was bound. 4th. That the indentures were ſtampt with one ſix-penny ſtamp only.—Theſe objections overruled; but *Qu.* whether it ought not to appear that one of the juſtices aſſenting was of the *Quorum*? Fraud cannot be preſumed.

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The pauper was bound apprentice by indenture to a weaver at *Utoxeter*, who had with him 9*l.* 10*s.* (the ſame being pariſh-money), but he had no ſtock or work to employ the apprentice in. One of the indentures was ſealed and delivered by the maſter, and the other by "*J. S.* overſeer of the pariſh of *Wool-*"*ſtanton*;" and the indentures were allowed and confirmed "by two juſtices of the peace," but the boy was no party thereto, and they were ſtamped with one ſixpenny ſtamp only, [which was the point the ſeſſions founded their opinion upon]. The apprentice was a cripple from his birth, and not *ca- * P 363
pable of doing any buſineſs; and was carried to his maſter on an horſe behind his grandmother againſt his conſent: And he lived ſix or ſeven months with his maſter, who then abſconded.

It was moved this term by ſolicitor general *Strange*, that the order of ſeſſions be quaſhed. For (as he argued) though the boy was not a party to the indentures, yet as the binding was by the overſeer of the pariſh, and with the concurrence of two juſtices, it is ſufficient upon the ſtatute of 43 *El. c.* 2. *ſ.* 5. And as to the objection ariſing from the ſtamping, all indentures of apprenticeſhip, where the binding is by pariſh-money, are excepted from the additional duties, by 8 *A. c.* 9. *ſ.* 40. and the practice in ſuch caſes always hath been to ſtamp the indentures with one ſixpenny ſtamp only. The conſequence hereof is, that by the pauper's living with his maſter above forty-days, he gained a ſettlement at *Utoxeter*.

On the other ſide it was argued by Sir *Thomas Abney*, Mr. *Legg* and others, that in this caſe the binding was void; (1) Becauſe it does not appear that one of the juſtices who confirmed the orders was of the *quorum*, it being only ſaid, "two of his Ma-"jeſty's juſtices of the peace." By the 43 *El.* it is neceſſary

neceſſary that one of the juſtices be of the *quorum*; for the words of the ſection relating to this point are, "by two juſtices of peace aforeſaid;" which muſt refer to the firſt ſection, which mentions "two juſtices, one whereof is of the *quorum*." (2) All the overſeers ought to have concurred in the indentures; whereas it is ſtated only, that one of them was ſealed by "*J. S.* overſeer of the poor, *&c.*" and though it is mentioned afterwards, that the binding was by the overſeers, yet this is to be rejected, as being repugnant. (3) The boy himſelf is no party to the indenture, which is a neceſſary requiſite upon the ſtatute of 3, 4 *W. & M. c.* 11. *ſ.* 8. 1 *Salk.* 479. S. C. 5 *Mod.* 329. (4) It does not appear for what time the apprentice is bound; whereas by the 43 *El.* the
* P 364 binding ought to be, in the caſe *of a male child, until he be twenty-four years old. And therefore where the binding is not for that time, it is inſufficient to gain a ſettlement; as all powers created by act of parliament muſt be exactly purſued. (5) The indentures are not duly ſtampt. And in the caſe of *The pariſhes of Cureden* and *Leland*, *(a)* for that reaſon a binding was held to be inſufficient for gaining a ſettlement.

(a) 2 Stra. 903. 1 Barnard. 379. 466.

It was alſo objected, that the binding and ſervice appears to have been fraudulent; it being ſtated that the boy was a cripple, and incapable of doing any buſineſs; that he was carried to the maſter by force, and that the maſter had no ſtock or work: All which circumſtances are evidences of fraud.

It was replied by Mr. ſolicitor general and Mr. *Ford*, in anſwer to the ſeveral exceptions taken to the binding; (1) That the clauſe in the 43 *El.* mentions only "juſtices of peace aforeſaid" without ſaying "ſuch juſtices as aforeſaid:" And in the third ſection mention is made of juſtices of peace, without

out requiring one to be of the *quorum*. Beſides, the ſeſſions knew whether either of the juſtices who made the original order was of the *quorum* or not: And as it is ſtated, that the indentures were allowed and confirmed by two juſtices, without their making any doubt thereupon, all neceſſary ingredients are to be intended as well in the caſe of an order as of a ſpecial verdict. *Earl of Shrewsbury's caſe*, 9 *Co.* 51. *b.* (2) It muſt be taken that *J. S.* was the only overſeer, which is not unuſual. (3) By the 43 *El.* the overſeers and juſtices only are impowered to bind poor perſons apprentices, without making the concurrence of the apprentice neceſſary; and if this was the caſe, the ſtatute might eaſily be evaded. Beſides, it would be intirely uſeleſs, as no action can be brought againſt the apprentice. (4) It is never ſtated in orders, that the binding is till twenty-four: For as to this the ſtatute is directory only, and it is only a circumſtance intended for the benefit of the maſter; and at farthest the omiſſion hereof makes the binding voidable *only. Agreeable to this are the determinations in the caſes of *The inhabitants of Cherbury* and *Arſcot*, (*b*) *Haſt.* 9 *G.* 2. (where the binding was till twenty-three) and of *St. Peter's* and *St. Nicolas in Ipſwich*, (*c*) *Trin.* 10 *G.* 2. Where one was bound apprentice for four years only; and yet it was held ſufficient to gain a ſettlement. As to the laſt objection to the binding, this hath been already anſwered. But ſuppoſing the objections to the binding to be material, yet as here hath been a colourable one at leaſt, and the pauper actually lived under it for above forty days, he hath gained a ſettlement by the 3, 4 *W.* & *M.* for it would be very inconvenient if ſettlements under apprenticeſhips were to be ſet aſide, becauſe every requiſite relating to the binding be not exactly purſued.

* P 365

(*b*) Poſt. 373.

(*c*) 2 Stra. 1066. Bur. S. C. 91.

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As to the objection of fraud, it was answered, that though there be circumstances shewn which induce fraud, yet this is a fact, and cannot be presumed, but must be expressly stated in orders as well as in special verdicts.

Bur. S. C. 60. 167.

For these reasons all the objections taken to the sessions order were over-ruled by the whole court, (*Page* just. *absente*) except only the first objection to the binding, which the court took time to consider of.

Post. 371.

The King against *Dr. Bettisworth.*

That a suit depending in the ecclesiastical court concerning the validity of a will, is a good return to a *mandamus* to grant probate thereof.

A *Mandamus* was granted, commanding the judge of the prerogative court of *Canterbury* to grant probate of the will of *Bridget Blunket*, deceased, to her executors: To which it was returned, that before the coming of the writ a suit was instituted, and is now pending in the prerogative court, between *F. B.* natural brother and next of kin of the said *B. B.* of the one part, and the said executors of the other part, touching the validity of the said will.

* P 366 *And a peremptory *mandamus* was now prayed, for that this is an ill return, and made only for delay. And *Carth* 457. S. C. *Salk.* 299. Lord *Londonderry*'s case, and the late case of the lord *Angleseat*, were cited on this side.

† *King* and *Dr. Bettisworth*, *East.* 10 *G.* 2. Motion by serjeant *Parker* for a *mandamus* to grant Probate of the will of the late earl of *Angleseat* to the executor. And though a caveat was entered, and a commission of appraisement prayed by the present earl of *Angleseat* as creditor, yet as the validity of the will was not disputed, a *mandamus* was granted. And lord *Londonderry*'s case, * *Hil.* 3 *G.* 2. was there cited, where the same thing was done under the like circumstances. (A)

* 2 Stra 857. Fitz G. 125. 1 Barnard. 280.

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On the other ſide it was argued by Sir *Thomas Abney*, that there is no caſe where an eccleſiaſtical judge has been commanded to grant probate or adminiſtration pending a ſuit concerning the validity of a will; and yet in *Woolaſton* and *Walker*, (*a*) (about four years ſince) it was ſolemnly determined, that in ſuch caſe the adminiſtration would be good. Beſides, this *mandamus* is not founded upon any act of parliament. And *Mich.* 4 *G.* 2. (*b*) where one *Smith*, the grandfather, prayed a *mandamus* to have adminiſtration during minority granted to him, it was ſaid by the chief juſtice, that there is no inſtance of ſuch *mandamus* where it does not fall under ſome act of parliament: And there it was alſo ſaid, that ſuch *mandamus* is not grantable where the ſeveral perſons claiming adminiſtration are related in the ſame degree to the inteſtate. In the preſent caſe the will relates wholly to perſonal eſtate, ſo that the ſpiritual court is the ſole judge whether it be good or not.

(*a*) 2 Stra. 917. 2 P. W. 576. Fitz G. 202. 257. Barnard. B. R. 433.

(*b*) *Rex* v. *Battiſworth*, Fitz G. 163. 2 Stra. 892. See Ante 24. 2 Stra. 957.

And *per tot' curiam*, a very ſufficient cauſe is here returned for not granting probate: And what makes the caſe the ſtronger is, that the perſon who controverts the will is next of kin to the deceaſed, and conſequently is intitled to adminiſtration if the will be not good. The whole matter is alſo within the juriſdiction of the eccleſiaſtical court. And beſides, this court will not grant a *mandamus* in any inſtance but * P 367 in ſuch caſes as are within *acts of parliament, and by way of carrying the precepts thereof into execution. And *Lee* C. J. cited *Gray's caſe*, *Comb.* 454. and *The King* againſt *the Biſhop of Litchfield and Coventry*, (*c*) *Mich.* 9 *G.* 2. A *mandamus* was there granted to the biſhop to admit a perſon uſher of the free-ſchool in *Coventry*; to which he returned, that a caveat had been entred againſt licenſing ſuch perſon, which ſuit was then pending: And the court allowed the return. The lord chief juſtice alſo ſaid, that there

(*c*) 2 Stra. 1023. 2 Barnard. 365. 428.

was a late cafe (*d*) where it was moved to diſcharge a *mandamus* for granting adminiſtration, *quia erronice emanavit*, a ſuit being then pending in the ſpiritual court concerning a will: And the court was of opinion, that it ought to be diſcharged, for the reaſons before mentioned.

(*d*) See *Rex* v. *Bettiſworth*, 2 Barnard. 420.

In the principal caſe a peremptory *mandamus* was therefore refuſed.

See *Rex* v. *Hay*, 4 Bur. 2295. 1 Blacſt. 668. S. P.

Eaſter

*Eaſter Term, *P 368

12 Geo. II. 1738.

Sir *William Lee*, Chief Juſtice.

Sir *Francis Page*,
Sir *Edmund Probyn*,
Sir *William Chapple*, } Juſtices.

Davenport, on the demiſe of Kirkby, againſt *Jackſon*.

In ejectment it was moved by ſerjeant *Bootle*, towards the latter end of the laſt term, that defendant may be at liberty to plead, that the lands in queſtion are in the county-palatine of *Lancaſter*.

In ejectment, upon application to plead to the juriſdiction, the rule to ſhew cauſe was intitled in the name of the tenant in poſſeſſion, but the affidavit to ground it was intitled in the name of the caſual ejector; the rule therefore diſcharged.

To which it was objected by ſolicitor general *Strange* and Mr. *Deniſon*, (1) That the affidavit upon which the motion was originally made is intitled in the name of the caſual ejector, and the rule to ſhew cauſe, &c. is in the name of the tenant in poſſeſſion; which is wrong, it being impoſſible to maintain an indictment of perjury on that affidavit. And laſt term, in *Crofts* and *Wells*, a rule was diſcharged for this reaſon. (2) In the affidavit and rule the title is, "*Davenport on the demiſe of Kirkby*" only, whereas it

it ſhould have been ſaid, " ——— of *Kirkby* and " *Lee*;" becauſe the firſt count in the declaration is founded on a joint demiſe of both. There is indeed another *on the demiſe of *Lee* only, but his name is not mentioned in the title. (3) The declaration being delivered before the eſſoin day of the laſt term, the preſent application ought to have been made by the practice of the court within the four days of that term: But after the defendant is *in cuſtodia mar'* he cannot apply for leave to plead to the juriſdiction. *Carth.* 355. (4) It does not appear that all the tenants live in the county palatine of *L.*

* P 369

On the other ſide it was argued by Sir *Thomas Abney* and ſerjeant *Bootle*, (1) That it was impoſſible to intitle the affidavit otherwiſe, there being at the time of making it no other defendant in court beſide the caſual ejector. And in *Jones* and *Hammond*, *Eaſt.* 5 *G.* 2. in this court, upon a motion by Mr. *Reeve* for leave to plead antient demeſne in ejectment, the affidavit was intitled in the name of *Rhode*, the caſual ejector, and the rule was taken out as againſt the tenant in poſſeſſion. And the caſe cited *contra*, of *Crofts* and *Wells*, was made up by conſent. (2) It is uſual to name not all the leſſees, but only the firſt that is mentioned in the declaration. And it is ſworn by the affidavit, of which the declaration is made a part, that the defendant was ſerved with a copy thereof; ſo that it appears plainly to be the declaration in the cauſe. (3) This application was made within two days after the appearance of the preſent defendant: And where an ejectment is brought for land lying in a county-palatine, it may be impoſſible to apply within the four days. To this point were cited *Jones* and *Hammond* before mentioned, and *Thruſtout on the demiſe of lady Lawley* and *Holdfaſt*, (*a*) a tenant of lady *Falconbridge*, *Trin.* 3, 4 *G.* 2. in

(*a*) 1 Barnard. 352. 365.

in this court. (4) It appears that all the lands lie in the county-palatine of *L.* and therefore it is not material where the tenants live. And in the caſe of *Acton* and *Somner*, it was not pretended that in ſuch caſe an action lies in this court. Ante 193. 198.

But *per tot' cur'*, It is an eſtabliſhed point, that a rule in one cauſe cannot be ſupported by an affidavit made in *another. And though in ejectment, after the tenant in poſſeſſion appears, it is the ſame cauſe in conſequence that it was before, yet he then is the defendant; and therefore an affidavit made in the cauſe whilſt it was between the leſſor and the caſual ejector cannot be applied to him. This objection does not appear to have been taken in *Jones* and *Hammond*; and that of *Crofts* and *Wells* is in point. * P 370

Upon this objection therefore the court diſcharged the rule, without giving any opinion on the other objections.

Aſhford againſt *Hand.*

ACTION on the caſe by an indorſee upon a note of hand for paying 5*l.* 5*s.* by inſtalments; and the laſt day of payment being not yet come, he counted only for ſuch part as was due: For which he had a verdict.

Indorſee of a note payable by inſtalments, may, before the laſt day of payment, declare for the part that has become due.

And it was moved by *Mr. Lacey* in arreſt of judgment, (1) That an action is not maintainable upon this note till all the days of payment are incurred, becauſe it is an intire contract for one intire ſum, though it be to be paid at different times. And what ſhews this to be an intire contract is, that the plaintiff

plaintiff as indorſee can declare only on the note. *Owen* 42. *Co. Lit.* 292. *b.* And though it may be ſaid that this action ſounds in damages, yet the leaſt variance from the note would be fatal. (2) The plaintiff ought to have counted for the whole money. *Cro. Jac.* 505.

It was anſwered by Mr. *Marſh*, and ſo it was reſolved, (1) That though in the caſe of an intire contract an action cannot be brought till all the days are paſt, yet where the action ſounds in damages, (which is the preſent caſe) the plaintiff may ſue, in order to recover damages for every default made in payment. And ſo is *Co. Lit.* 292. *b.* (2) It is unreaſonable that
* P 371 an action muſt be *brought for money not due; and the caſe in *Cro. Jac.* 505. is a very extraordinary one: But it does not prove this declaration to be ill.

The motion was therefore denied.

S. C. Ant. 362.

The pariſhes of Woolſtanton and *Utoxeter.*

One of the juſtices confirming indentures of apprenticeſhip, muſt be of the *Quorum*. A caſe ſtated in a ſpecial order of ſeſſions, muſt ſhew a good ſettlement; nothing is to be intended.

THIS caſe was now ſtirred again: And it was urged by Sir *Thomas Abney* and Mr. *Birch*, that by the 43 *El. c.* 2. it is neceſſary that indentures of apprenticeſhip be confirmed by two juſtices, *quorum unus:* And this being a judicial act, it ought to appear on the face of the order to have been executed according to the letter of the ſtatute, and cannot be intended. 3 *Mod.* 269. And ſo upon the 13, 14 *Car.* 2. *c.* 12. where rates are made, it muſt appear that one of the juſtices was of the *quorum*. The binding therefore in the preſent caſe is a mere nullity.

On

On the other ſide it was argued by ſolicitor general *Strange* and Mr. *Ford*, that it appears by the firſt clauſe of the act, the uſe of the word [aforeſaid] in *ſect.* 5. is, that the juſtices be of the ſame county: And in this clauſe the words [ſaid] and [ſuch] (which would refer the matter to juſtices *quorum unus*) are omitted. But ſuppoſing it to be neceſſary that one of the juſtices be of the *quorum*, (1) This is involved in the expreſſion here uſed, that the indentures were "allowed and confirmed:" For this cannot properly be ſaid, unleſs one of the juſtices was of the *quorum*, in caſe this be neceſſary. A ſpecial order is to be conſidered in the ſame light as a ſpecial verdict; and in the caſe of *Hellidge* and *Hungerford*, which was an action on a by-law, the queſtion was, whether the by-law muſt be taken to be in writing, (which in that caſe was neceſſary by the charter) becauſe the words of the ſpecial verdict were, "*fecit legem ſive ordinationem:*" And the court held, *that it muſt be intended to be in writing, be- * P 372
cauſe a corporation cannot emit words, but muſt neceſſarily ſpeak in writing. (2) As the court below has made no doubt of the authority of the juſtices by whom the indentures were allowed, this court ought not to make any doubt thereof: And ſo it is in the caſe of ſpecial verdicts. (3) The indentures can be no more than voidable; for the act of the juſtices is barely a conſent to that of other perſons: And it is not neceſſary that all the circumſtances mentioned in the ſtatute relating to the binding be purſued *quoad* the gaining of a ſettlement. *The inhabitants of Reading* and *Newbury*, (*a*) cited by lord *Hardwicke* in the caſe of *Cherbury* and *Arfcot*, and reported in a book called, *A collection of caſes of ſettlements*, (8*vo.*) there a pauper was bound apprentice by the pariſh; and though it did not appear

(*a*) Caſes of Set. 77. Foley's Poor Laws 168. See Bur. S. C. 130.

pear that the indentures were confirmed by juſtices of peace, yet as the apprentice went and lived with his maſter above forty days, it was held he gained a ſettlement under the ſtatute of 3, 4 *W.* 3.

It was alſo now objected to the caption of the ſeſſions order, that it is not ſet out when the original ſeſſions to which the appeal was made was held, it being only ſaid, "which ſaid appeal was reſpited "from the tranſlation to this ſeſſions." And in many caſes, (particularly *The King* and *the inhabitants of Heptinſtal*, *(b) Trin.* 10 *G.* 2.) where an order hath been made at an adjourned ſeſſions, and it was not ſhewn when the original one was held, the order hath been quaſhed.

(*b*) Bur. S. C. 88. S. P. Bur. S. C. 102. Ante 103.

On the other ſide this laſt point was admitted for law. But then it was ſaid that the ſeſſions, by which this order is made, was not held by adjournment: For in the caption it appears to have been made at *Michaelmas* ſeſſions, and reſpited from the tranſlated ſeſſions.

Lee C. J. ſaid, that in ſpecial orders of ſeſſions, ſuch a caſe muſt be ſtated as plainly ſhews the ſettlement to be in the place where the juſtices have determined it: And *ſo it was declared by lord *Hardwicke*‡; though in lord *Parker*'s time it was otherwiſe.

* P 373

‡ *Inhabitants of Cherbury* and *Arſcot*, *Eaſt*, 9 *G.* 2. motion (by Mr. *Huſſey*) to quaſh an order of ſeſſions, confirming an order of juſtices for removing a pauper from *Arſcot* to *Cherbury*, where, as it appeared by the ſeſſions order, he had been bound apprentice: And the moſt material objection was, that no inhabitancy was ſhewn. And *per Probyn* and *Lee* juſt. as this was not in queſtion on the appeal, and the firſt order allows of an inhabitancy, the order of ſeſſions is good. But *Hardwicke* C. J. ſaid, he was fearful of making preſumptions in the caſe of ſpecial orders: And that it being ſaid in the order, that the caſe appeared to be this, the whole muſt be taken to be ſtated therein, and nothing is to be intended out of it. And afterwards by conſent the order was ſent back to have the omiſſion ſupplied. *(A.)*

But

But the court remaining doubtful, whether the facts, as here ſtated, ſhew a ſufficient binding, they took time to adviſe, and to look into the caſe cited of *The inhabitants of Reading* and *Newbury*.

And afterwards this term it was ſaid by the lord chief juſtice, that in the caſe cited of *Newbury* and *St. Mary's, Reading*, which was *Trin.* 3 *G.* 1. it was held, that though in the order no conſent of the juſtices appeared, yet the binding was ſufficient to gain a ſettlement. But then the ſingle point upon which it was ſo determined was, that the boy himſelf had conſented to the binding, and had lived a ſufficient time to gain a ſettlement. The chief juſtice alſo ſaid, that the ſection upon which the preſent queſtion depends, refers to the whole preceding part of the act; and therefore the objection is immaterial, that there is one clauſe therein which does not require one of the juſtices to be of the *quorum*. And the 8, 9 *W.* 3. *c.* 30. *(ſ.* 5.*)* recites, that this is neceſſary. And he cited *The inhabitants of Panſley* and *Chalton*, (*c*) *Hil.* 5 *G.* 2. where this very exception was taken by Mr. *Fazakerley*, and Mr. *Strange* himſelf (who was on the other ſide) thought it to be a fatal one: And a rule *niſi* being granted for quaſhing the order on that exception, it was afterwards quaſhed. And the chief juſtice ſaid, that the caption of the preſent order is very right.

(c) Or *Herley v. Charlton*, 1 Seſs. Ca. 155. Bur. S. C. 131.

The juſtices order was therefore quaſhed, and that of the ſeſſions confirmed.

Kingſton

*P 374 *Kingſton* againſt *Holloway*.

Proceedings ſtaid upon a bail bond aſſigned after the death of the principal.

MOTION by ſerjeant *Agar* to ſtop proceedings on a bail-bond, becauſe the aſſignment thereof was ſubſequent to the death of the original defendant. And he argued, that by the 4 *Ann. c.* 16. *ſ.* 20. it appears that bail-bonds ought to be aſſigned in the life-time of the principal. And as the firſt ſuit abated by the death of the defendant, all the incidents and conſequences of that ſuit abated alſo thereby, though this matter cannot be pleaded.

On the other ſide it was ſaid by Mr. *Stacey*, that bail ought to have been put in ſooner than it actually was: And the preſent application is too late, the *latitat* againſt the bail being returnable the laſt return in *Hilary* term laſt.

But as to this laſt point it was ſaid, that the declaration was delivered but laſt term.

And *per curiam*, It was the plaintiff's own fault not to take an aſſignment of the bail-bond before: And though perhaps the original defendant was in fault in not giving bail ſooner, which the plaintiff might have compelled him to have done, yet the bail was not in any. The penalty of the bail-bond only is recoverable againſt the bail; and the intent of ſuch bond is to procure the appearance of the principal, in order to aſcertain the debt; whereas now the bail are diſabled from ſurrendering the principal, and cannot aſcertain the original debt, becauſe the firſt ſuit

ſuit is abated. In caſes of bail, the court exerciſes an equitable power, and will not ſuffer bail to be injured. And *Chapple* juſt. ſaid, that if the aſſignment had been made in the life-time of the original defendant, and there had been proceedings thereon, yet if he had died before judgment, the proceedings ought to be ſtaid. And he remembered ſuch a caſe in the Common Pleas, where, though the cauſe had been for ſometime depending, and it was *objected that a trial againſt the principal had been loſt, yet as he died before judgment, the proceedings againſt the bail were ſtopt, becauſe the original debt could not be aſcertained. * P 375

In the principal caſe therefore the motion was granted; but the defendants were ordered to pay coſts, it being ſworn, that the plaintiff did not know of the death of the principal.

In *Sparrow* v. *Naylor*, 2 Blackſt. 876, proceedings on the bail bond were ſtaid becauſe it was aſſigned when the original ſuit was out of Court, by the plaintiff's not declaring in time.

Baſs againſt *Hickford and his wife.*

ACTION for ſaying to the plaintiff, a ſingle woman, "you are a common ſtreet-walking "bitch, and ſtand every night at the corners of "ſtreets to be picked up by fellows." Plaintiff obtained a verdict and 12*d.* damages. And a *fieri facias* having been taken out and executed for the damages, and alſo for 18*l.* coſts,

The plaintiff recovering in an action for words not in themſelves actionable, is intitled to full coſts, though the damages are under 40*s.*

It

It was moved laſt term by Sir *Thomas Abney*, that the goods taken in execution may be reſtored; for that the words are in themſelves actionable, night-walking alone being puniſhable at common law, and indictable. *Lamb. on conſtables* 12. *Crompt. Juſt.* 86. *Latch* 173. S. C. *Poph.* 208. And conſequently 12*d.* being given for damages, the plaintiff is intitled to no more for coſts. But otherwiſe it is where the words are not in themſelves actionable, and the damages are given only for a conſequential loſs, for there it does not fall within the ſtatute. And ſo it was reſolved in *Berry* and *Perry*, *(a) Trin.* 5 *G.* 2. in this court, (which was an action brought for calling a tradeſman a cheat, and laid to the ſpecial damage of the plaintiff) after great debate, and upon conſideration of *Salk.* 206. S. C. *Far.* 129. and other books.

(a) 2 Ld. Ray. 1588. 2 Stra. 936. 2 Kely. 71. S. P. *Baker* v. *Hearn* Bull. N. P. 11. *Collier* v. *Gaillard* 2 Blackſt. 1062.

*On the other ſide it was now argued by Mr. *Theed*, who inſiſted, that theſe words are not actionable; and he cited *Salk.* 696.

* P. 376

The court agreed to the difference laid down by the defendant's counſel relating to coſts: And the reaſon thereof (they ſaid) is, that the ſtatute expreſly mentions actions of ſlander; but if the words be ſuch as give the party an action in reſpect of the ſpecial damage reſulting therefrom, and are not in themſelves actionable, it is not properly an action of ſlander, but a ſpecial action on the caſe. But then the court was clearly of opinion, that the words in this caſe are not of themſelves actionable. The firſt, taken ſingly, are not ſo: for a perſon is not puniſhable for being a common ſtreet-walker, though night-walking (which the books cited ſpeak of) is; this being dangerous to the publick. And the latter words ſhew only an intention of lewdneſs: And taking

ing them all together (as they ought to be) in the ſtrongeſt ſenſe, they amount to the calling the plaintiff a whore, which is the common meaning of the word [night-walker]: And the calling a perſon whore or bawd alone, without a ſpecial *damnum*, is not actionable, unleſs it be by the cuſtom of *London*; as it was held in the late caſe of *Lockyer* and *Dangerfield*. And *Lee* C. J. ſaid, that though theſe words appear to have been ſpoken in *London*, the court cannot take notice of the ſaid cuſtom. And the caſe cited in *Salk.* 696. is material, as the penalty here charged on the plaintiff can only be fine and impriſonment. 2 Ld. Ray. 1004. Ante 286.

The rule granted for ſhewing cauſe, &c. was therefore diſcharged.

See *Turner* v. *Hertue*. Barnes. 132. *Mitchell* v. *Youngbuſband*, Barnes. 135. *Tiſſin* v. *Glaſt*. Barnes. 143. *Surman* v. *Shelleto*, 3 Bur. 1688. *Carter* v. *Fiſh*. Stra. 645.

Hickman againſt *Colley*.

S.C. 2 Stra. 1120.
*P 377

ACTION on the caſe upon ſeveral promiſes; one of which was for five pounds for repairing an houſe of the defendant, upon a ſpecial contract; and the *damnum* was laid to be above forty ſhillings: But the plaintiff recovered a verdict for one pound five ſhillings only. And *Lee* C. J. (before whom the cauſe was tried) reported the caſe to be this: The damages *found* being under 40s. the defendant is allowed to enter a ſuggeſtion of the parties being citizens of *London* to intitle him to coſts on 3. Jac. 1. c. 15. though the damages laid were above 40s.

The

The plaintiff, (who is a bricklayer) at the defendant's requeſt, ſent his ſervant to an houſe belonging to the defendant to take a view of it, and was ordered to bring an eſtimate of the expence to which the reparation would amount; which he accordingly did: And a large ladder, and alſo ſome lime, were carried to the houſe by the plaintiff, under an expectation of doing the work: But he was countermanded by the defendant from proceeding farther therein. And the C. J. ſaid, that there was no contract proved between the parties; and that he was not diſſatisfied with the verdict.

Upon this caſe it was moved, that the plaintiff may file the plea-roll, and bring in the *poſtea*; that the defendant may enter a ſuggeſtion on the roll, in order to intitle himſelf to coſts upon 3 *Jac.* 1. *c.* 15. the parties being citizens of *London*, [of which an affidavit was produced] and the debt, for which the action was brought, being under forty ſhillings. And ſolicitor general *Strange*, in ſupport of the motion, cited the following caſes; in moſt of which ſuch ſuggeſtions have been allowed. *Pennil* and *Wallis*, (*a*) *Mich.* 9 *W.* 3. *Marſfield* and *Soame*, *Trin.* 1 *G.* 1. *Brancton* and *Crab*, (*b*) *Hil.* 3 *G.* 1. *King* and *Polland*, (*c*) *Trin.* 3 *G.* 1. *Catherell* and *Cooper*, (*d*) *Walker* and *Sir Philip Egerton*. (*e*) *Deveniſh* and *Marton*, *Eaſt.* 7 *G.* 2. in this court†. *And it was urged, that ſuch a ſuggeſtion can be of no prejudice to the plaintiff, becauſe he may plead or demur to it: And ſo it was done in ſome of the above-cited caſes.

(*a*) Stra. 47.
(*b*) Stra. 46.
(*c*) *Poland.* Stra. 49.
(*d*) 2 Barnard. 103. 117. 2 Kely. 59
(*e*) Stra. 50.
* P 378

† *Deveniſh* and *Marton*, *Eaſt.* 7 *G.* 2. A diſcontinuance having been prayed to be entred up in an action of treſpaſs for taking away the plaintiff's gun, the defendant applied for leave to enter up a ſuggeſtion, that he was a juſtice of peace, and in the execution of his office, in order to have double coſts. But the court ſaid, that as by the diſcontinuance both parties would be out of court, ſuch ſuggeſtion would not be proper; and therefore they granted a rule, that on payment of double coſts the plaintiff might diſcontinue. (*A*). S. C. 2 Stra. 974. 2 Kely. 187. Bull. N. P. 332. V. *Grindley* v. *Holloway* Doug. 295.

On

On the other ſide it was objected by ſerjeant *Urling*, Mr. *Deniſon* and others, (1) That it does not appear that either of the parties is within the deſcription of the ſtatute of *Jac.* 1. In the affidavit produced, the plaintiff is ſaid to be "citizen and brick-"layer of *London*," without ſhewing that he was ſo at the commencement of the action, or that he was then reſiant within the city. And as to the defendant, it appears that he is "a large trader," and "conſiderable merchant;" whereas the act attends only to inferior tradeſmen, ſuch as victuallers, *&c.* which are mentioned in the body thereof: And the title ſpeaks only of "poor "debtors." (2) This application cannot now be made; (1) Becauſe it is too late. (2) The judgment is entered as taken by default: And in *Marsfield* and *Soame* (cited *contra*) it was held, that if default be at the trial, this motion cannot be made. This matter does not indeed appear in the preſent caſe by the *diſtringas*; but this was altered without the plaintiff's conſent; and the *poſtea* is contrary thereto, and ſhews, that the judgment was taken by default. [And an affidavit was produced to ſhew that the judgment was at firſt entered in this manner.] (3) Although the damages here given are under forty ſhillings, yet as the plaintiff had a probable cauſe for the recovery of more, this is not a caſe within the ſtatute. For the words thereof are [debt to be recovered]; whereas if the meaning was, that the court ought to be determined by what appears upon the trial, or by the verdict, it would have been ſo expreſſed; as it is in the ſtatute of 1 *W. & M. ſeſſ.* 2. *c.* 8. where it is ſaid, which "upon the trial ſhall be found," *&c.* Thoſe words "to be recovered" mean only the cauſe of action: And ſo ſtatutes of a like nature have been conſtrued. So where the ſtatute of *Glouc. c.* 8. *enacts, that none ſhall bring treſpaſs before juſtices unleſs the goods taken away were worth forty ſhillings; this

So in *Brampton* v. *Crabb.* Stra. 46.

* P 379

muſt

muſt appear in the plaintiff's count. *Bro. juriſdiction, pl.* 45. 2 *Inſt.* 312. The 21 *Jac.* 1. *c.* 23. (which is cotemporary with the ſtatute now under conſideration) againſt removing actions out of the inferior courts, where the value is under five pounds, ſays, "if it ſhall appear or be laid in the declaration," *&c.* which laſt words ſhew the meaning of the precedent ones. And upon the 5 *G.* 2. *c.* 27. (which enacts, that where the cauſe of action does not amount to ten pounds, the proceedings ſhall be in *Engliſh*) the court hath always refuſed to ſet aſide proceedings where the *damnum* was ten pounds, though the jury found the damages to be under that ſum. In the preſent caſe one of the counts is for five pounds upon a ſpecial contract: And though the work contracted to be done was countermanded, yet an action may be brought for the whole ſum. 3 *Lev.* 244.

See *Horton* v. *Kilmore*, Cas. T. Hardw. 5. 2 Kely. 157.

It was replied by Mr. ſolicitor general and Mr. common-ſerjeant *Garrard*, (1) That it is ſworn that the plaintiff is "a citizen and bricklayer of *L.*" and this is not denied on the other ſide; and as to the defendant, it appears that he is a trader: And conſequently this is a caſe within the act, which was made for the benefit of defendants. (2) As to the time, if the defendant had applied ſooner it would have been irregular: For in *Marſfield* and *Soame*, the firſt application was made before the verdict; and it was held to be too ſoon. The other part of the objection, that there was a default at *niſi prius*, would, if true, be a fatal objection: And upon this objection the ſuggeſtion was refuſed in *Branſton* and *Crabb*. But in the preſent caſe it does not appear by the *diſtringas* that the verdict was taken by default: And though the *poſtea* is different, yet the *diſtringas* (which is the warrant for that) is only to be regarded. And in fact there was no default. And Mr. ſolicitor ſaid, that the practice of entering

Stra. 46.

entering a verdict as taken by default, where it was not ſo, is not to be endured: And the only reaſon for doing it is, becauſe there *is a fee to be paid for it. (3) In anſwer to the laſt objection, the caſe of *Pennil* and *Wallis*, as it was ſtated in *Brancton* and *Crabb*, is in point. That was upon a *quantum meruit*; and the verdict was for thirty ſhillings: And though it was incertain in point of damages, a ſuggeſtion was there allowed. * P 380

For theſe reaſons the court over-ruled the two firſt objections. And *Lee* C. J. ſaid, in relation to the firſt of them, that as it is ſworn the plaintiff is a citizen and bricklayer of *L.* and it is not ſworn on the other ſide but that he was ſo at the beginning of the action, this is to be intended. And as to the other part of the ſame objection, though the preamble of the ſtatute mentions only poor debtors, yet the enacting clauſe mentions tradeſmen in general; and upon this the conſtruction muſt be.

As to the laſt objection, the C. J. ſaid, he ſhould give no opinion thereupon; and that if it was plain the defendant was not intitled to coſts, he ſhould be againſt allowing the ſuggeſtion: But that he was very far from being clearly of this opinion, and the caſe of *Pennil* and *Wallis* is to the contrary; and therefore as there is no caſe in point on the other ſide, it would be hard to refuſe the defendant leave to enter up the ſuggeſtion, eſpecially as this is his only remedy, and may be traverſed in every part. And ſuch ſuggeſtions have always been allowed. And the reſt of the court ſeemed ſtrongly inclined to think, that the laying the *damnum* above forty ſhillings is not alone ſufficient to draw the caſe out of the ſtatute, becauſe this may be always done, and conſequently the act wholly evaded; but that the words [to be recovered] muſt be underſtood of ſuch damages as the

plaintiff ſhall have a good and effectual verdict for, and upon which he ſhall be intitled to final judgment.

The rule was therefore now made abſolute *(per totam curiam)* for entring up the ſuggeſtion.

S. P. *Weſton* v. *Donnelly*. Sayer. 273. See *Fitzpatrick* v. *Pickering*. 2 Wilſ. 68. Barnes, 470. It appears from *Strange's* report of the principal caſe (2 Stra. 1120) that the plaintiff demurred to the ſuggeſtion, and the defendant got judgment; and was held intitled to his coſts of this application as well as of the trial and former proceedings.—In *Taylor* v. *Blair*. 3. Term Rep. B. R. it was held that a defendant living within the juriſdiction of the court of requeſts of *Weſtminſter*, if ſued in a ſuperior court for a debt under 40*s.* muſt, (to have the benefit of 23 *Geo* 2. c. 27,) plead the ſtatute in bar; and if he do not, the Court will not allow him to enter a ſuggeſtion or ſtay proceedings.—See *Woolley* v. *Clouſman*, Doug. 232. *Waſe* v. *Wyburd*, Doug. 234. *Aylwey* v. *Burrows*, Doug. 250. *Wiltſhire* v. *Lloyd*, Doug. 366.

S. C. 4 Bur. 2031.

* P 381

**Holliday* againſt *Burgeſs*.

An attorney defendant may change the *venue* to *Middleſex*.

MOTION by Mr. *Yorke*, at the inſtance of the defendant, to change the *venue*, in an action on a note of hand, from *London* to *Middleſex*, becauſe the defendant is an attorney, and mentioned in the record to be *præſens in curia*: And this is a tranſitory action.

(a) 2 Stra. 1049. 4 Bur. 2028.

And *Lee* C. J. cited *Wigley* and *Morgan*, *(a)* (*Trin.* 9 *G.* 2. in this court) which was an action for a malicious proſecution; and it was moved to change the *venue* from *Surry* to *Middleſex*, becauſe the defendant was an attorney; and granted accordingly. And in that caſe *Biſhop* and *Burgeſs*, (*Hil.* 5 *G.* 2.) was cited, where the like rule was granted, becauſe the

the defendant was an attorney. *Page* juſt. ſaid, that in the caſe of the clerk of aſſize of the *Norfolk* circuit, in lord *Holt*'s time, (in which he was counſel) the *venue* was changed to *Norfolk*, becauſe the defendant, as clerk of aſſize, was obliged to attend there. And *per Probyn* juſt. the like rule was granted in the caſe of a counſel. And *Chapple* juſt. ſaid, that where an attorney is plaintiff, wherever he lays the *venue* it ſhall not be changed.

This is a miſtake. The plaintiff being clerk of aſſize originally laid the *venue* in *Middleſex* and brought it back thither after it had been changed. *Knight* v. *Farnaby*, 2 Salk. 670.

In the principal caſe the motion was therefore granted.

It has been ſince ſettled that an attorney defendant has no privilege to change the *venue* to *Middleſex*. See *Pope* v. *Redfearne*, 4 Bur. 2027. and the caſes there cited. 4 Bur. 2029.

Stroler againſt *Heber*.

ACTION for a ſimple-contract debt againſt an executor; to which the defendant pleads ſeveral judgments: The plaintiff replies *per fraudem*. And before rejoinder, it was moved by Mr. *Bootle* to amend the defendant's plea by ſtriking out one of the judgments pleaded. And though this was ſtrongly oppoſed by ſolicitor general *Strange*, and Mr. *Deniſon*, (who cited *The Bank of England* and *Morrice* *contra*) yet the proceedings being in paper, the *court ſaid, that in ſuch caſe leave is always given to amend, unleſs it appears to be for delay: And therefore granted the motion.

Plea of ſeveral judgments, by an executor allowed to be amended by ſtriking out one of the judgments, after replication. Ante 110.

* P 382

Palmer againſt *Crowle.*

A verdict not to be ſet aſide on the affidavit of two of the Jurors, that the Jury intended to give but 7s. beſides the money brought into court, inſtead of the ſum for which the verdict was declared and entered up.

ACTION by a coachman againſt his maſter for wages, and money diſburſed about the horſes, &c. and he obtained a verdict for 23*l.* 17*s.* And it was moved, on the part of the defendant, to ſet aſide this verdict, upon an affidavit by two of the jurors, that the jury intended to have given a verdict for 7*s.* only, above the 23*l.* 7*s.* which the defendant had brought into court.

To which it was objected by Mr. *Hollings*, that the rule for bringing in the money was laid before the jury, which (it is well known) ought to be conſidered as part of payment; ſo that they had the whole under their conſideration. And it would be of ill conſequence to permit a jury after verdict to ſhew their intention, in order to overturn it. They cannot vary their verdict after it is recorded. 2 *Hale's Hiſt.* 300. *Co. Lit.* 227. *b.* Much leſs ought a verdict to be ſet aſide on an affidavit by two jurors only. And he mentioned the caſe of one *Porter*, where application was made to ſet aſide a verdict, upon an affidavit of the jury, that they proceeded on a miſtake; but no regard was had to it, becauſe it would be going againſt the record.

It was argued in ſupport of the motion by Mr *Marſh* and the defendant himſelf, (who was a barriſter at law) and others, that it would be injuſtice to found a judgment on what is not true in fact: And the preſent is a miſtake more properly of the officer who

who enters up the verdict, or of the foreman, than of the jury in general. And Mr. *Marsh* said, that he remembered a case at the **Nisi prius* bar in *Kent*, before judge *Tracey*, where the issue lay on the defendant by reason of special pleading, and the jury mentioned the defendant, by mistake, for the plaintiff, and the officer took down the verdict accordingly; and thereupon though the jury were dispersed, the judge sent for them back again, in order to rectify the verdict; which was done accordingly, after an examination of the jury one by one. Mr. *Philips*'s case (*a*) in *C. B.* was also mentioned, which was an action on the statute for preventing bribery in the election of members of parliament; and there the verdict was set aside, on an affidavit by the jurymen, of their having tost up cross and pile, in order to determine their finding. * P 383

(*a*) *Philips* v. *Fowler*, Com. Rep. 525. Barnes, 441. Prac. Reg. C. B. 409. See 1 Term. Rep. B. R. 11.

In the principal case *Lee* C. J. (who tried the cause) certified, that on the trial there was some evidence, though it was but dark, that so much was due to the plaintiff as amounts both to the money brought in and for which the verdict is given; and also that the verdict was declared in the same manner it is taken. And *(per totam curiam)* it would be of very dangerous example to suffer jurors to come in and suggest a mistake in order to invalidate their acts upon oath, especially where their verdict is not contrary to evidence, as this case is. *Probyn* just. also said, that he should be very cautious in collecting a jury, after they are dismissed from their oaths, in order to set aside their verdict, because no one knows whom they meet in the way. And the C. J. said, that though it is sworn the jury intended and agreed to give a verdict for so much, yet they might vary it afterwards; and so in fact they did.

The motion was therefore denied.

See *Cogan* v. *Ebden*, 1 Bur. 383. *Jackson* v. *Williamson*, 2 Term Rep. B. R. 281.

The

*P 384 *The King* againſt *Sharpe.*

An Information granted for publiſhing an affidavit ſtating that an affidavit charging baſtardy upon the defendant was ſworn before a certain Juſtice of peace named, by his contrivance and without its being read to the perſon ſwearing it. Information granted tho' the defendant denied his having confeſſed the publication, as was alleged in the oppoſite affidavit; he not denying the fact itſelf.

MOTION by ſolicitor general *Strange* for an information againſt the defendant for publiſhing in one of the news-papers an affidavit, by a woman, of baſtardy upon the defendant, ſworn before Sir *William Billers*, alderman of *London*; and alſo another affidavit by the ſame woman before another juſtice, wherein it is charged that ſhe ſwore the former, by the contrivance of Sir *William Billers*, without its having been read to her. And this motion was founded on an affidavit only of one perſon, that the defendant confeſſed to him the publication of the ſaid affidavits. On the other ſide it was ſworn by the defendant, that he never confeſſed the publication: But he did not deny the fact itſelf.

The whole court were clearly of opinion, that the publication of theſe affidavits, though no ſcandalous reflections are made upon the caſe, is puniſhable; eſpecially as they tend highly to defame a magiſtrate.

And therefore though it was ſtrongly objected to the motion by Mr. *Lloyd* and Mr. *Deniſon*, that the confeſſion, upon which alone it is founded, is abſolutely denied, yet as the publication itſelf is not denied, the information was granted.

Ray,

Ray, adminiſtrator, &c. againſt *Liſter.*

S. C. 2 Stra. 1110.

DEBT upon two judgments, one of which was for 30*l.* and the other for 10*l.* and the *damnum* was laid to be 10*l.* only. The defendant pleaded payment. And the jury found for the plaintiff, and gave 30*l.* damages; and judgment was given laſt *Michaelmas* term accordingly. And after error brought, and the record *tranſcribed, it was prayed laſt term† that the record may be amended, by inſerting 30*l.* inſtead of 10*l.* which was laid for damages: But this being refuſed, it was moved the ſame term by Mr. *Taylor*, that leave be given to the plaintiff to enter a *remittitur* on the judgment roll, of 20*l.* damages, in order to make it agreeable to the declaration. And it was ſubmitted on the part of the plaintiff, that on the defendant's waiving his writ of error, the plaintiff ſhould pay the coſts of the writ, becauſe then it muſt be ſuppoſed that the ſame was brought on account of this miſtake: But if this be refuſed, then it was urged the plaintiff ought not to pay the coſts thereof, becauſe in ſuch caſe the writ muſt be taken to be brought for other defects.

The Judgment and Verdict being for greater damages than what are laid in the declaration, a *remittitur* cannot now be entered; nor can the judgment be amended.

* P 385

† Ante 351.

On the other ſide it was argued by Sir *Thomas Abney*, Mr. *Marſh* and Mr. *Deniſon*, that though it be uſual to remit damages before judgment, (*Co. Entr.* 2. *Thomſ. Entr.* 458.) there is no inſtance of its having been ever done afterwards. And though the judgment

judgment of a court is in its power during the ſame term it is pronounced, yet afterwards the court cannot alter it, unleſs it be by virtue of an act of parliament. As to the ſtatutes of jeofails, none of them extend to the preſent caſe. This error is not a miſpriſion of the clerk, it not be ing in his power to enter a *remittitur* of damages without the plaintiff's conſent; (and it is doubtful whether the court can do it) but it is a ſubſtantial part of the judgment in point of law, becauſe it is a queſtion in point of law, whether the plaintiff ſhall have damages *pendente lite*: And if more damages be given than by law he ought to have, it is an error in ſubſtance. Neither is this a defect of the ſame kind with thoſe enumerated in the ſtatute of 16, 17 *Car.* 2. *c.* 8. this being not only a miſtake in the ſubſtantial part of the judgment, but alſo warranted by the finding of the jury. On this ſide were cited *Blackamore's caſe*, 8 *Co.* 163. *Pinfold's caſe*, 10 *Co.* 115. *b.* 1 *Roll.* 206. *pl.* 10. 1 *Bulſt.* 49. 1 *Sid.* 70.

Stat. 8 H. 6. c. 15.

* P 386 *In ſupport of the motion it was argued by ſolicitor general *Strange* and Mr. *Taylor*, that by the ſtatute of *H.* 6. a power is given to the courts to alter a judgment in a term after it is pronounced, where it is erroneous by the miſpriſion of the clerk: And this act hath received a very liberal conſtruction. *Cro. El.* 864. *Hob.* 327. S. C. *Hutt.* 41. 1 *Roll.* 206. *Cro. Jac.* 633. 1 *Vent.* 132. 2 *Jones* 212. But ſuppoſing that the preſent miſtake cannot be conſidered as a miſpriſion of the clerk, it is within the ſtatute of *Car.* 2. which comprehends matters of ſubſtance. And on this ſide the following caſes were cited: *Smith* and

and *Fuller*, (a) *Mich.* 1 *G.* 2. Treſpaſs in *C. B.* and the defendant was found not guilty as to part, and as to other part, it was found for the plaintiff. And after error brought, it was objected to the judgment, that it contained no acquittal of the defendant; and the court ſtrongly inclined to think this a fatal objection: But however they ordered the caſe to ſtand over, to give the party an opportunity of applying to the court of *C. B.* to amend the judgment. And in another term and year too it was amended accordingly: And afterwards the record in this court was amended, and the judgment affirmed. *Foſter* and *Blackwell*, (b) *Eaſt.* 10 *G.* 2. Debt upon bond in *C. B.* and after a writ of error was brought and argued, it was moved below by ſerjeant *Parker* to amend the judgment, which was, that the plaintiff, "ought to recover." And though this court thought the judgment to be erroneous, the court of *C. B.* (on the authority of *Smith* and *Fuller*, and 1 *Vent.* 132, and other caſes) gave leave to amend; though it was in another term, and there was nothing to amend by. *Tully* and *Sparks*, (c) *Eaſt.* 3 *G.* 2. There in the judgment the words "*ex aſſenſu ſuo*," in relation to the taxation of damages, were omitted; and after the caſe was gone up into the Exchequer, it was altered below in another term, and amended above. *Verne* and *Verne*, *Mich.* 8 *G.* 2. in this court. In dower the defendant pleaded *nunque ſeiſie*, &c. and a jointure; and there was judgment againſt him on both pleas, and he was amerced twice: And error *being brought, the judgment was held to be erroneous; but leave was given to ſtrike out one amercement.

(a) 2 Stra. 786.

(b) Barnes, 7.

(c) 2 Lor Raym. 1570. 2 Stra. 867.

V. *Gerrard* v. *Gerrard*, 1 Salk. 54. Ld. Ray. 72.

Upon

Upon the argument of this caſe it was ſaid by *Lee* C. J. *Probyn* and *Chapple* juſt. that the court may amend judgments of a preceding term, where they are erroneous by the miſpriſion of the clerk, and the amendment is warranted by ſome of the antecedent proceedings; and alſo in inſtances mentioned in or ſimilar to ſuch as are mentioned in the ſtatute of *Car.* 2. and under one of theſe conſiderations all the caſes cited for the motion will fall. But this the court hath no power to do, either where the judgment is given purſuant to the verdict, (as it ought to be, unleſs the plaintiff himſelf enters a *remittitur* before judgment, which in ſome caſes he may do) and conſequently it is perfect and compleat; or where the judgment is erroneous by the act of the court in point of law. The foundation therefore upon which the argument in ſupport of the motion is built wholly fails. As to entring the *remittitur*; if this be now done, it will make the judgment erroneous. And *Chapple* juſt. ſaid, there is no inſtance in the books of a plaintiff's applying to the court to remit; but this he always does himſelf, and the court gives judgment accordingly. The ſaid three judges were therefore clearly of opinion, that a *remittitur* cannot now be permitted.

But *Page* juſt. inclined to think that the judgment is amendable, becauſe the iſſue being, whether 10*l.* was due to the plaintiff, ſo much as is found beyond that ſum is ſurpluſage, and ought to be rejected as not warranted by the record. And the preſent miſtake ſeems to be of a like nature with the inſtances mentioned in the ſtatute of *Car.* 2.

The

The caſe therefore, by reaſon of juſt. *Page's* doubt, was adjourned for conſideration: And this term the court delivered their opinions *ſeriatim*. And (1) It was reſolved by the whole court, that this being after judgment, there *cannot be a *remittitur*, the conſtant practice being to do this before judgment. *Pinfold's caſe*, 10 *Co. Second book of judgments* 117. And *Lee* C. J. and *Chapple* juſt. ſaid, there are inſtances of a judgment being entered up only for the damages mentioned in the declaration, where more have been found by the verdict, without any *remittitur*: To which point *Chapple* juſt. cited the *old book of judgments* 155. (2) It was held by *Page* juſt. (for the reaſons before mentioned by him) that this judgment is amendable. But the other three judges retained their former opinion to the contrary: And they cited *Telv.* 45. 1 *Bulſt.* 49. *Carth.* 167. And *Lee* C. J. ſaid, that this cannot be conſidered as *vitium clerici*, becauſe (according to 10 *Co.* 117. *b.*) in ſome caſes the plaintiff may have judgment for more damages than he has counted for. * P 388

The rule being for leave to remit, *per tot' curiam* it was now diſcharged.

See *Chevaley* v. *Morris*, 2 Blackſt. 1300. S. P.

The

S. C. 2 Stra. 1109.

The King againſt *Hebden.*

In *Quo Warranto* againſt a bailiff of a corporation, he pleads a nomination by A. and B. two bailiffs thereof. Upon the iſſue taken on their being bailiffs, a Judgment of *Ouſter* in a *Quo Warranto* againſt them is admiſſible, but not concluſive, evidence.

IN a *quo warranto* for acting as one of the bailiffs of the corporation of *Scarborough*, the defendant (after ſhewing the conſtitution of the ſaid corporation) pleaded an election, under a nomination by *Batty* and *Armſtrong*, the two bailiffs of *Scarborough*. Several iſſues were taken upon the defendant's plea; one of which was, whether *Batty* and *Armſtrong* were bailiffs at the time of the ſaid election. And at the trial, (which was at the aſſiſes in *Yorkſhire*, before *Chapple* juſt.) the defendant gave a general evidence, that *B.* and *A.* had been choſen, and had acted as bailiffs. On the other ſide the proſecutor produced the record of a judgment of ouſter in a *quo warranto* againſt theſe perſons for acting as bailiffs; and (upon debate) this being admitted as evidence, and no evidence being given by the defendant, this iſſue, with ſome others, was found for the King, and the other iſſues for the defendant.

* P 389 *And it was moved this term, by ſolicitor general *Strange*, for a new trial, for a miſdirection of the judge of aſſiſe, in admitting improper evidence.—And after he had made a report of the caſe in the manner before ſtated,

It was argued by Mr. ſolicitor, Mr. *Deniſon* and others, that it muſt be taken that the judgment of ouſter was produced and admitted as concluſive evidence, becauſe (1) On the trial it was ſo treated by the

the profecutor's counſel; who compared it to the caſe of a verdict againſt an anceſtor, a teſtator or inteſtate; which binds the heir, executor or adminiſtrator. (2) This was the only evidence produced by the profecutor in relation to this point. (3) A record if admitted cannot be falſified by parol proof; as in the caſe of parties and privies; and alſo in the caſe of ſtrangers, where it goes to the diſability of perſons, as upon outlawries, &c. and ſo it is where the record is evidence of another law; as in *Milman's* caſe, (which was cited at the trial) where it was held by *Hardwicke* ‡ C. J. that a judgment in court-chriſtian, of the nullity of a marriage, is concluſive evidence againſt the whole world. As the judgment therefore in the preſent caſe muſt be conſidered as concluſive evidence, it is clear that the judge of aſſiſe was guilty of a miſdirection: For though a judgment muſt be admitted to be concluſive as to the parties themſelves, though it be in other actions, yet it is not ſo with reſpect to another who is a ſtranger to the ſuit: And the reaſon is, becauſe the judgment might ariſe from miſpleading, or might be ſuffered by default or colluſion. *Bract. lib.* 5.

But (as to this point) *Chapple* juſt. ſaid, that the record was not produced as concluſive. And *per Lee* C. J. as the defendant offered no evidence againſt it, the proper queſtion now is, whether it ought to have been received at all.

*And it was urged that it ought not, becauſe the preſent defendant was a ſtranger to the firſt ſuit, and * P 390

‡ This ſeems a miſtake; (but ſee Caſ. T. Hardw. 238.) The caſe alluded to is that of *Prudam* & al' v. *Com. Phillips*, alias *Muilman*, alias *Delafield*, coram *Willes* C. J. after M. Term 1737. *Hargave's* Tracts 456.—V. *Clews* v. *Bathurſt*, 2 Stra. 960. Caſ. T. Hardw. 11.—*Dacoſta* v. *Villa Real* 2 Stra. 961.—*Hatfield* v. *Hatfield* 2 Stra. 961. 2 Bro. P. C. 62.—Alſo 2 Veſ. 246 and the *Ducheſs of Kingſton's caſe* 11 Str. T. 261. and *Meadow's* v. *Ducheſs of Kingſton*, Amb. 756.

not

not capable of doing any thing in defence of it; neither is he privy thereto; and therefore he ought not to be prejudiced by the judgment there given; eſpecially as it might perhaps be obtained through colluſion or miſtake. And this is the more unreaſonable, becauſe the preſent proſecution, at leaſt *quoad* the fine, is a criminal one; and therefore the rule, *quod res inter alios acta alteri nocere non debet*, (which is derived from the civil law) extends to this caſe. To this point were cited 3 *Mod.* 141. *Sir William Clargis* and *Sherwin*, (*a*) *Mich.* 11 *W.* 3. The queſtion there was, whether a record ought to be allowed to prove a legitimacy: And it was laid down for a rule, (upon the authority of *Co. Lit.* 352.) that no record ought to be admitted as evidence againſt one who is neither party nor privy thereto. *King* and *Liſle*, *Hil.* 11 *G.* 2.

(*a*) 12 Mod. 343. Bull. N. P. 232.

Ante 163.

It was farther argued, that ſuppoſing the judgment againſt *B.* and *A.* to be concluſive, yet as they were at leaſt officers *in facto* when the defendant was choſen, this is ſufficient to warrant his election, this being a neceſſary act for the ſupport of the corporation.

Ante 163.

On the other ſide it was argued by Sir *Thomas Abney*, Mr. *Lloyd* and others, that there is a privity between this and the former defendants, *viz.* a privity of ſucceſſion: A ſucceſſor ſtanding in the place, and claiming under the right, and being bound by the acts of his predeceſſor. The judge of aſſiſe did therefore right in permitting the judgment to be read; and if it had been fraudulently obtained, evidence might have been given thereof; but none having been given, it is ſufficient. To this point were cited *Co. Lit.* 103. *a.* *Carth.* 181. *Skin.* 15. 3 *Mod.* 141. *Trials in pais, edit. 7th, fol.* 366.

Rumbal

Rumbal and *Norton*. *Mandamus* to ſwear in *Rumbal* a freeman of *Calne* in *Wilts*; and on the trial a judgment of ouſter againſt one of his *electors was given in evidence. *Loſil* and *Bancroft and others*, (*b*) 11 *Decemb.* 1732. Treſpaſs for taking goods; to which the defendants pleaded not guilty: And on the trial, which was before lord *Raymond*, the queſtion being, whether *Bancroft* was a bankrupt on the day of committing the treſpaſs, a verdict found upon an iſſue, which had been directed by the court of Chancery between *Bancroft* and *Loſil* only, was admitted as evidence againſt all the parties, after great debate: And that put an end to the cauſe. In *The King* and *Daffen*, and *The King* and *Syred and Johnſon* 1735. (all of whom were pretended members of the borough of *Orford*). ſeveral judgments of ouſter againſt capital burgeſſes were read, on the trials at bar, againſt the defendants. *King* and *Follet*, *mayor of Southampton*, *Mich.* 13 *G.* 2. Upon a trial at bar a judgment of ouſter againſt defendant's predeceſſor was there given in evidence. *King* and *Pindar*. Motion for an information againſt *Pindar* as mayor, and againſt *Thomſon* as one of his voters: And lord *Raymond* ſaid, that the information ought firſt to be tried againſt *Thomſon*; and if it ſhould appear thereon that he had no right to vote, he ſhould be againſt trying the other: And there was ſome diverſity of opinion, whether informations ſhould go againſt both.

* P 391

(*b*) Bull N. P. 40.

As to *B.* and *A.*'s being officers *de facto*, it was anſwered, that they ought not to be conſidered as ſuch, becauſe they were followed with a recent proſecution.

It was further objected, that one of the findings is, that a majority of chamberlains did not meet upon the election of the defendant; which is neceſſary

ſary to make a good choice: And alſo that the cuſtom of nomination is not ſuch as the defendant founds his right upon; and conſequently as it appears he had no title, there muſt be judgment of ouſter againſt him, though the iſſue now agitated had been found againſt him. [And *Chapple* juſt. ſaid, that moſt of the iſſues were found for the King.] And the court held this to be a fatal objection: And
* P 392 they *were alſo clearly of opinion, that the judgment againſt *B.* and *A.* was good evidence againſt defendant, eſpecially as he claimed under them: And ſuch judgments have been often given and allowed as evidence againſt third perſons. But the court ſaid, it was not concluſive, for that the defendant might have proved that the judgment was obtained by colluſion, or that the firſt defendants were reſtored.

The motion was therefore denied.

S. P. *Rex* v. *Grimes.* 5 Bur. 2601.

S. C. 2 Stra. 1124.

Haſſwell qui tam, &c. againſt *Chalié and others.*

An importer of wine in pipes and hogſheads, ſells to three ſeveral perſons a dozen of quart bottles thereof, unmeaſured, which were carried away by the buyers and drunk in private houſes; this held to be a ſelling by retail, and within 12. *Car.* 2. c. 25.

DEBT *qui tam, &c.* for 840*l.* for ſelling wine without licence: To which the defendants pleaded *Nil debet.* And as to 825*l.* part of the ſaid ſum of 840*l.* the jury found a general verdict for the defendants; and for the reſidue thereof, they found a ſpecial verdict; which in effect was as follows:

The defendants were merchants, and importers of wine into the port of *London* in pipes and hogſheads, and always paid the cuſtoms by the gallon; and without having any licence whatſoever, they ſold to three ſeveral perſons one dozen bottles, commonly

called

called quart bottles, of red port wine unmeaſured by any meaſure: Which ſaid wine was part of the wine imported by the defendants, and was drawn out of pipes, and carried away by the buyers, and drank in private houſes. It was alſo found, that all wholeſale importers take an oath that the wine is imported by way of merchandize, and doth not belong to a vintner or retailer: And the ſtatute of 12 *Car.* 2. *c.* 25. was alſo ſet out in the verdict.

And it was now argued by ſolicitor general *Strange*, that the buying wine in pipes and hogſheads, and ſelling it by dozens of bottles, is retailing, as much as diſpoſing *of it in any other quantity; and * P 393
it is plainly within the reaſon and the letter of the 12 *Car.* 2. For in the introductory part it is ſaid, "for the better ordering the ſelling of wines by re-"tail;" and though the enacting clauſe does not mention bottles amongſt the meaſures there enumerated, yet it contains the words, "any greater or "leſſer retail meaſure." Beſides, it is found that the wine was ſold by quart-bottles; and therefore it is to be taken that each bottle contains a quart; and this meaſure is expreſly mentioned in the ſtatute. If it does not hold ſo much, or if it holds more, then the caſe falls within the other words. The ſubſequent act of 15 *Car.* 2. *c.* 14. alſo ſhews that all ſorts of retailing by any meaſure whatſoever, is within the 12 *Car.* 2. and it further ſhews that the words, "within his manſion-houſe, &c. or without," &c. in that act are to be underſtood indefinitely, and mean any place whatſoever. But ſuppoſing the preſent caſe not to fall within the above mentioned act, it is plainly within the general clauſe of 7 *E.* 6. *c.* 5. (*ſ.* 8.) which impoſes the ſame forfeiture as the other act; it being found that the defendants had no licence whatſoever: And the concluſion of the

count is general, *viz.* "contrary to the form of the "ſtatute in that caſe made and provided." And Mr. ſolicitor cited *Aſtell qui tam. &c.* and *Andrews*, (a) *Mich.* 13 *G.* 1. as a caſe in point. That was an action of debt upon the 12 *Car.* 2. for ſelling wine without licence; to which the defendant pleaded *Nil debet.* And it was found ſpecially, that the defendant was a merchant in *Briſtol*, and that, without having any licence to ſell by retail, he ſold in his manſion-houſe one gallon of wine; which was carried into the *Guilder-inn* in *Briſtol*, and drank there. And it was argued by Mr. *Fazakerly* for the defendant, that the wine not having been drank in any place in the occupation of the defendant, and it being only a ſingle act, it was not a retailing within the ſtatute; which being a penal law, ought not to be extended beyond the letter. But the court held, that a merchant cannot ſell by retail; and that the ſelling but
* P 394 one gallon is within the ſtatute; the *penalty of 5*l.* being impoſed for every ſelling by retail. Judgment therefore was given for the plaintiff.

(a) 2 Lord Raym. 1421. 2 Stra. 718.

On the other ſide it was argued by ſerjeant *Wynne*; (1) That a merchant-importer ſelling by retail, is not within the ſtatute of 7 *E.* 6. or 12 *Car.* 2. the intention of both thoſe acts being only to reſtrain taverns and publick houſes from ſelling wine, becauſe theſe places are the reſort of idle and diſſolute perſons. This appears by the preambles of thoſe two laws; and alſo by *ſect.* 2. of the latter, (which ſtatute is explanatory of the other) whereby the King is impowered by commiſſioners to licence perſons, *&c.* to ſell by retail wine to be drunk as well within their manſion-houſes, *&c.* as without, *i. e.* within and without the doors of the houſe. The form of the licence further ſhews this; the proviſo being, that if the

the rent reſerved be not paid, the commiſſioners are to leave notice at the tavern or wine-cellar. And in the oath, and the ſtatute of 1 *Jac.* 2. *c.* 3. *ſ.* 6. which directs it, the merchant-importer is put in oppoſition to the vintner or retailer: And by the book of rates, they pay differently to the crown. To this point was cited *Hardr.* 338. which was ſaid to be the leading caſe in *Aſtell* and *Andrews*. (2) It was urged, that the ſelling wine, in the manner ſtated in this verdict, is not within the ſtatutes before mentioned. As to retailing in general, no preciſe definition can be given of it. According to the ſtatutes of 8, 9 *W.* 3. 1 *A. c.* 12. and 12 *A. c.* 2. the ſelling cyder in ſo great a quantity as one hundred hogſheads is retailing it. By the 3, 4 *E.* 6. *c.* 21. the ſelling a weight of cheeſe, or a barrel of butter, is retailing: And by the 21 *Jac.* 1. *c.* 22. the ſelling four weight of cheeſe, or four barrels of butter, is declared to be retailing. This ſhews that the word [retailing] is to be taken *ſecundum ſubjectam materiam*. Now here by the 7 *E.* 6. retailing is declared to be a ſelling by the gallon, no higher meaſure being mentioned; and this is a well-known meaſure, and as antient as the time of *E.* 1. and is the higheſt retail-meaſure. And the 12 *Car.* 2. deſcribes retailing to be by *the pint, quart, pottle or gallon, without mentioning a bottle, which is no certain meaſure, and is not taken notice of in any ſtatute before the 1 *G.* 2. *c.* 17. (*ſ.* 7.) It is indeed here found that the bottles were called quart-bottles; but it is well known that theſe contain different quantities: And it is not to be intended that they hold an exact quart, nothing being to be preſumed in caſe of a verdict. *Hardr.* 346. 1 *Show.* 539. Beſides, ſuch an intendment is contrary to the preſent finding; which is, that defendant ſold by a dozen bottles unmeaſured, *i. e.* without any meaſure. It is further obſervable, that the common way of im- * P 395

porting wine before the 1 *G.* 2. *c.* 17. was in bottles, (as appears by the book of rates, *fo.* 103, 104, *&c.*) which ſhews that the ſelling in bottles is not retailing. As to the caſe of *Aſtell* and *Andrews* cited *contra*, it was ſaid, that there the wine was ſold by a ſingle gallon, which is declared expreſly to be retailing; whereas here the ſale was in a much greater quantity, and without any determinate meaſure.

Lee C. J. As to the queſtion, whether a merchant-importer is within the ſtatute of *Car.* 2. this was ſet-
Ante 393. tled in *Aſtell* and *Andrews*. It was there inſiſted for the defendant, that though the words of the 12 *Car.* 2. are general, yet as the ſtatute takes notice of the wine being ſold to be ſpent within the manſion-houſe of the vendor, *&c.* it did not extend to that caſe. But the court held, that though the wine was not drank in the houſe, or any other place, of the ſeller, it was within the ſtatute: And they much relied, and very juſtly, on the 15 *Car.* 2. as declaratory, by the recital of it, of the ſenſe of the firſt act. As to the other point, (which is the only queſtion now before us) whether this be a ſelling by retail; it ſeems a more proper conſideration for a merchant than a lawyer. The notion I have of ſelling by retail is, that it is a ſelling contrary and in oppoſition to a ſelling by wholeſale, *i. e.* where any thing is ſold in a leſs quantity than it is bought. The objection, that the ſelling by a dozen bottles unmeaſured is a ſelling with-
*P 396 out any meaſure, *ſeems very odd. It muſt be ſome meaſure or other. The 12 *Car.* 2. is not confined to the meaſures therein ſpecified; the ſubſequent words being, "by any greater or leſſer meaſure:" And the 15 *Car.* 2. leaves out the particular meaſures enumerated in the former act, and only mentions in gene-

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ral, ſelling by retail. It ſeems therefore very difficult to make out this ſelling not to be by retail.

Page juſt. of the ſame opinion, that this caſe is within the 12 *Car.* 2. and he ſaid, that every quantity is a meaſure between the parties.

Probyn juſt. There are ſome certain known meaſures by which the trade and cuſtoms are governed; but if wine is ſold by meaſures which do not exactly quadrate with thoſe, there is no reaſon that the ſeller ſhould be excuſed from paying the duties. According to this he may eaſily evade it, by varying a little from the preciſe and well known meaſures. This the legiſlature ſeems to have had in view, by adding the words, "by any greater or leſſer meaſure." It is here found that the defendants ſold the wine by one dozen bottles, called quart bottles, drawn out of hogſheads, and not meaſured: But it is to be obſerved, that the merchant computes his profit by the gallon, as he pays according to that to the crown. Beſides, a quart bottle is a quart; and it makes no difference whether the quart be in glaſs or pewter. As to the other point, it is to be obſerved, that a wholeſale importer pays leſs than a retail or private one; and conſequently if this laſt ſells by retail, he gets more profit than the other, and defrauds the publick revenue: And if a merchant condeſcends to retail, he is a retailer.

Chapple juſt. I was at the trial of the caſe of *Aſtell* and *Andrews* at *Briſtol*, and the ſingle queſtion there was, whether a merchant ſelling wine in ſmall quantities, not to be ſpent in his own houſe, is a ſeller by retail within the 12 *Car.* 2. and it was determined that he is. As to *the preſent queſtion, the ſelling muſt be either by wholeſale or retail; and certainly the ſelling a dozen bottles is not the former. This would be ſufficiently plain, even if the word [quart] had not been added, though bottles do not always

* P 397

always contain the ſame quantity: But the ſelling is found to be by one dozen of bottles, commonly called quart bottles; which is all one as if it had been ſaid, a dozen quart bottles. The ſtatute extends to any retail meaſure, by virtue of the general words, "or any greater or leſſer meaſure."

The whole court ſeemed now ſtrongly inclined to give judgment for the plaintiff; but counſel being retained for the defendants, upon their earneſt importunity an *ulterius concilium* was granted.

Note; This caſe was further argued, *Hil.* 13 *G.* 2. by ſerjeant *Eyre* for the plaintiff, and Mr. *Marſh* for the defendants: But the court retained their former opinion, which they delivered much to the ſame effect as before. And judgment was then given for the plaintiff.

From Sir *John Strange*'s report of this caſe, it appears that this Judgment was reverſed in the Houſe of Lords, 5th of *March* 1740, becauſe it was not found that the dozen of quart bottles were a retail meaſure, and a *Venire de novo* was awarded.

APPENDIX.

APPENDIX.

COMMON PLEAS,

HILARY TERM, 15 GEO. II.

Roe on the demiſe of *Gulliver* againſt *Wickett*. Vide Ante 263. n.

WILLES, Ch. J. delivered the opinion of the court.*

Teſtator deviſes freehold lands to his wife for life and after her death to ſuch child as ſhe was ſuppoſed to be enſeint with, in fee, provided that if ſuch child as ſhall happen to be born ſhould die before 21, leaving no iſſue, then the reverſion to his wife and two ſiſters reſpectively in thirds. The wife never was enſeint; It was held that this deviſe over of the reverſion never took effect.

This caſe comes before the court on a caſe, made at *Guildhall* at the ſittings, which ſtates that *Robert Wickett* having a wife named *Catherine*, and three ſiſters, *Elizabeth*, *Anne* and *Mary*, but no child or brothers, by his will, dated the 8th of *December* 1686, gave all his lands, tenements and hereditaments, whether in fee ſimple, for life or lives, leaſes for years, in poſſeſſion or reverſion, to

* In 2 Stra. 1093, it is ſaid that this caſe was ruled by *Willes*, Ch. J. and *Parker*.—In 1 Ves. 421. it is ſaid that this opinion was that of *Willes*, C. J. and the reſt of the court, except *Forteſcue*, J. (who differed, but did not hear the argument). The Mss. from which this is taken is ſilent as to this matter.

his

his wife for life, and after her deceaſe to ſuch child as his wife was ſuppoſed to be enſeint with, and to the heirs of ſuch child for ever; provided that if ſuch child as ſhall happen to be born ſhould die before it attain its age of twenty-one years leaving no iſſue, then the reverſion of one third part of all his lands ſhall go over to his wife *Catherine* and her heirs, and another third part to his ſiſter *Elizabeth* and her heirs, and the remaining third to his ſiſter *Anne* and her heirs. He alſo gave to his ſiſter *Elizabeth* 600*l.* to be added to her father's legacy, and to his ſiſter *Anne* 400*l.* and to his ſiſter *Mary* 5*l.* and makes his wife executrix.—The caſe then ſtates that the wife was not with child at the time of making the will, nor at the time of the teſtator's death; who died a few days after making the will. It ſtates that the teſtator was ſeiſed in fee of the premiſes in queſtion, and that the defendants claim under *Mary Wickett* one of the teſtator's ſiſters and co-heirs, and the leſſors of the plaintiff claim the whole under *Catherine* the wife and the other two ſiſters *Elizabeth* and *Anne*; and the queſtion is, whether, as *Catherine* the wife was not with child at all by the teſtator, the deviſes over to her, *Elizabeth* and *Anne*, could ever take effect? If they did, then the verdict which was given for the plaintiff, ſhould, by the parties agreement, ſtand for the whole; if not, then for two third parts only.

If this had been nothing more than a queſtion reſerved at *niſi prius*, I ſhould have had no doubt upon a caſe ſo clear as the preſent. But there being a judgment in B. R. on another part of this will, which may at firſt ſeem to differ in ſome meaſure from our opinion; and as Lord *Harcourt* has made a declaration, and in ſome ſort given his opinion on the ſame deviſe, contrary to our ſentiments, we have therefore thoroughly conſidered the caſe, and ſhall ſay more on the ſubject than otherwiſe was neceſſary.

V. Ante 263.

Jones v. Weſtcomb. 1 Eq. ab. 245. *Gilb. Eq. Rep.* 74. *Prec. Cha.* 316.

This

This caſe has been much obſcured by inſiſting on points, and citing caſes to ſupport them, which are not material to the queſtion. There were a great many cited in relation to deviſes to infants *in ventre ſa mere*; ſome in which all ſuch deviſes were held bad; others, that they are good *in futuro*, though void *in præſenti*; and a third ſet (though there has been no adjudication on them) that all ſuch are good, becauſe they are *in nature* of deviſes *in futuro*. It is plain by the caſes cited that thoſe who have talked about theſe deviſes have confounded themſelves, by not diſtinguiſhing between deviſes that are void *ab initio*, and ſuch as become ſo afterwards. It is certain if no child is born, the deviſe is void; but which of the three opinions is beſt, it will be time enough to determine when ſuch a caſe comes neceſſarily before the court. But in the preſent caſe we do not think it neceſſary to determine whether the deviſe to the child be good or not; for, laying it quite out of the caſe, the ſubſequent deviſe will ſtill depend on the ſame contingencies and fall under the ſame conſiderations. To ſhew that this was a material part of the caſe, two things were mentioned in the argument; one by the plaintiff, which was that, if the deviſe to the infant was void, the condition annexed to it was ſo too; and ſo the deviſe in remainder took effect and became abſolute immediately; the other was by the defendant, that, if this is falſe and the deviſe over is ſo connected with the condition, as that one depends on the other, then if the terms and contingencies of the condition do not happen, the deviſe over cannot take place; and inſtanced the caſe of *Roe* v. *Flood*. E. 2 *Geo.* 2. which as it regards the preſent caſe is thus:—A deviſe of lands to *R. Biſhop* and his heirs, upon condition that he do pay all the deviſor's debts and legacies, and if he did Fort. 184.

did not, then a deviſe over to *Elizabeth Flood*. *R. Biſhop* died before the teſtator, and it was adjudged that the ſubſequent deviſe depending on the former eſtate with the condition annexed, was become likewiſe void. But as we are all of opinion that the ſubſequent deviſe did not depend on the condition, that argument is of no weight. To ſhew that this queſtion concerning a deviſe to an infant *in ventre ſa mere* was material, it was farther offered by the plaintiff, that if there is a deviſe for life, then to another in remainder; if the firſt deviſe becomes void by the deviſee's dying in the life-time of deviſor, or by his becoming a monk and incapable of taking, the deviſe in remainder will veſt immediately. *Perk. Tit. Deviſes. Sect.* 566. 567.; and to be ſure this is good law, but not parallel to the preſent caſe; and there is no book or caſe, that where there is a deviſe for life and a void one in remainder, the ſecond ſhall become good becauſe the firſt is become void. Some queſtions have been made whether this is to be conſidered as an executory deviſe or a contingent remainder; but it is not material which it is, becauſe in either caſe it can never take effect if contingencies on which it depends never happen; but at laſt it was admitted by counſel on both ſides that it might be an executory deviſe, it not being ſuch a limitation as can take place, according to the rules of law, as a contingent remainder; and it certainly is ſo. Taking it then as an executory deviſe, there were many caſes cited on the part of the plaintiff to ſhew that it was good according to the rules of executory deviſes, and that the contingencies were not too remote. On the part of the defendant it was ſaid the contingencies were too diſtant, and that no caſe had ever gone ſo far. If the contingencies had happened

happened ſo as the leſſors of the plaintiff might claim as executory deviſees, this would have been material; but as they have not, it is out of the caſe. But the contingencies are not too remote, being to ariſe within twenty-two years at fartheſt, that is upon the death of a perſon within twenty-one years after his birth, and who muſt be born within one year after the death of the deviſor; and there are ſeveral caſes which have gone farther. I ſhall only mention the caſe of *Maſſenburgh* v. *Aſh.* 1 *Vern.* 234. 257. 304. where the limitation of the truſt of a term, (which is governed by the rules of executory deviſes) was held good, though the contingency would not happen 'till twenty-one years after the death of a perſon *in eſſe*. Many things were ſaid as to the word "provided"; that it is ſometimes a word of condition, and ſometimes of limitation. But as to that there is but one rule to go by; which is this; that it is either a term of condition or limitation according to the wording of the deed or will, and the intent of the parties. But this is not material here; for if it is a condition precedent the deviſe over will not veſt 'till it is performed; but if a contingent limitation, or rather an executory deviſe, it can never take effect till the contingency happens.

Having now cleared the caſe of the rubbiſh, the ſingle queſtion ariſing is this. Whether when a man deviſes an eſtate to A. on three contingencies, the deviſee can have it, though none of them happen? This is a deviſe to a wife and two ſiſters on three contingencies. 1ſt. If a child happen to be born. 2d. If it die before twenty-one. 3d. If without iſſue. None of theſe happened, but another has happened; viz. that the wife was not with child; as to which no direction is given in the will, and it is plainly a

caſus

caſus omiſſus; and the rule of law is, that an heir at law ſhall not be diſinherited unleſs by expreſs words, or an intent manifeſt and apparent, as laid down twice in *Cro. Eliz.* and in other books. Lord *Vaughan* has carried this further and ſays it muſt be by *neceſſary implication*. But I think this goes too far, and is to be found no where elſe; but *manifeſt intent* is ſufficient. In our caſe there are no expreſs words to take the eſtate from one of the co-heirs, in the caſe that now has happened. But it is ſaid that the intent appears, for two reaſons: firſt, he has given *Mary* only 5*l.* though he gave the others 600*l.* and 400*l.*; ſecondly, becauſe it is as reaſonable that the deviſees ſhould have the eſtate in caſe no child was born, as if it was born and ſhould die before twenty-one. As to the firſt; he has not left her *a ſhilling*, which according to the vulgar notion, amount to a diſinheriting, and I think this is a ſtrange uncertain preſumption and is not a manifeſt intent. As to the ſecond; it is merely gueſs work, and is *making* a will inſtead of *conſtruing* one. Out of all the caſes cited in the argument, only five relate to the point in queſtion. *Moore* 422. *Cro. Eliz.* 525. the word *or* conſtrued *and*, cited to ſhew that words are conſtrued out of their natural meaning to ſupport the intent. But there the court went in favour of the heir. It is an imperfect caſe and not of the greateſt authority. *Holcroft*'s caſe, *Moore* 486. *Graſcot* v. *Warren*, *Comb.* 437. and in *caſes in K. Wm.'s time*, which is a caſe very like the preſent but ſtronger of the two, for here the defendants claim under an heir at law, who is to be diſinherited; but there it was under an executor who is not ſo much favoured as an heir.—*Andrews* v. *Fulham*. *B. R. T.* 11 & 12. *Geo.* 2. upon this ſame will. But we think that there is a great difference between the caſes.

12 *Mod.* 128.

Ante 263.

That

That caſe was of the leaſehold; this of the freehold eſtate; and many things were ſaid at the bar to diſtinguiſh the caſes; 1ſt. That the plaintiff, againſt whom judgment was given, was repreſentative to the perſon who had aſſented to the deviſe over, and ſo was concluded: 2dly. That the ſame words in a will may have different conſtructions in regard to leaſhold and freehold eſtates, as in *Papillion* v. *Voice**. I cannot ſay whether this was the foundation of the opinion in *B. R.* But a caſe of a freehold was cited againſt the opinion of the court, and they ſaid the caſe before them was a leaſehold, whereas the caſe cited was of a freehold. *Jones* v. *Weſtcomb. Eq. ab.* 245. *M.* 10 *Ann.* It concerned a perſonal eſtate, and is a very imperfect caſe, ſo does not ſtand in the way.

* (2) P.W. 471. 1 Eq. ab. 185. *Fitz G.* 38. 2 *Kely.* 27. Ante 269, 270.

Therefore we are of opinion that the deviſe in remainder to the wife and the two ſiſters never took effect, and that on the death of *Catherine*, one third part deſcended to *Mary* one of the co-heirs of the deviſor, under whom the defendants claim. Therefore the verdict muſt be given for two thirds only.

AS it may reaſonably be expected that I ſhould inform the public upon what authority I offer the preceding caſe, I think it proper to mention that for it (amongſt ſeveral other manuſcript caſes of determinations about the ſame time, many of which I believe have not been publiſhed) I am indebted to a deceaſed relation who was a member of the *Iriſh* bar,

bar, and attended *Weſtminſter-hall*, as a ſtudent, about the time when the preceding caſe was determined; but by whom they were taken, I am totally ignorant. The caſe of *Roe* v. *Flood*, cited in the preceding caſe is reported in *Forteſcue's Rep.* 184. One queſtion there was, whether the benefit of a lapſed deviſe was to go to the heir at law, or to the reſiduary deviſee, which alſo occurred in *Doe* on the demiſe of *Morris* v. *Underdown*, C. B. M. 15 *Geo.* 2. cited 2 *Blackſt.* 737. 738. but not any where reported in print. I will therefore take this occaſion of giving it to the public, on the ſame authority as the preceding caſe. *Si quid noviſti rectius iſtis candidus imperti*, &c. G. W. V.

Doe ex dim. *Morris* againſt *Underdown.*

Teſtator deviſes certain lands to A. until B.C. and D. ſhould attain their reſpective ages of 21; and *then* to the ſaid B. C. and D. their heirs and aſſigns reſpectively, as tenants in common;

SPECIAL Verdict in ejectment. That *Richard Morris* being ſeiſed in fee of the premiſes in the declaration, (of which a third part is in diſpute) of the nature of *Gavelkind*, deviſed them to *William Underdown* and *Anne* his wife, until *John*, *William* and *Morrice* ſons of the ſaid *William* and *Anne* ſhould attain their reſpective ages of twenty-one and *then* to the ſaid *John*, *William* and *Morrice* their heirs and aſſigns reſpectively, equally to be divided between them as tenants in common, and not as joint-tenants; to take and hold their ſeveral ſhares as they ſhall arrive at their ſeveral ages of twenty-one, except *Wil-*

and he deviſes all the reſt and reſidue of his eſtates to E.—B. dies before the teſtator. The teſtator's heir, and not the reſiduary deviſee is intitled to B's ſhare of the lands, in fee; for the teſtator's intent is to be taken as things ſtood at the time he made his will, and then no intereſt in the lands remainded undiſpoſed of to go to the reſiduary deviſee, for had B. ſurvived the teſtator the eſtate would have veſted in him and deſcended to his heirs, though he had not been 21. for the word "Then" does not date when the intereſt is to veſt, but when it is to fall into *poſſeſſion*.

liam

liam and *Anne* his wife ſhall happen to die before that time, and after their deceaſes to the ſaid *John*, *William* and *Morrice* their heirs and aſſigns in manner aforeſaid, charged and chargeable nevertheleſs with the payment of 10*l. per ann.* to the ſaid *William* and *Anne*, during their lives, clear, of all taxes and deductions, to be paid half yearly, equally and proportionably out of their ſeveral eſtates as they ſhall come to enjoy them. Then the teſtator deviſes to *William* and *Anne Underdown*, all his lands and tenements, &c. lying in *Walmore* and not before deviſed, ſubject to the payment of debts and legacies. The teſtator deviſes all the reſt and reſidue of his eſtates to *Mary*, daughter of ſaid *William* and *Anne*, and her heirs ſubject to the payment of ſome particular legacies, and ſays his will is, that all his debts and lagacies ſhall be paid out of the eſtate given to *William* and *Anne* his wife, and *Mary* their daughter, equally amongſt them: and he makes *William Underdown* and *Anne* his executors. The jury find that *John Underdown* died in the life-time of the teſtator and that the teſtator continued ſeiſed to his death which was in *March* 1731, and that the leſſors of the plaintiff are couſins and heirs at law of the teſtator according to the cuſtom of Gavelkind; that *John* if he had lived would have been twenty-one, and that all the other deviſees are ſtill living.

The court on the firſt argument agreed on theſe points; 1ſt, that *John* dying in the life-time of the teſtator, nothing could veſt in him; 2dly, as the brothers took as tenants in common, there could be no ſurvivorſhip as to *John*'s part. 3dly, that the deviſe to *William* and *Anne* 'till the brothers attained their ages is not to be conſtrued, till *all* attain twenty-one; but till each reſpectively attain it.

WILLES,

WILLES, Ch. J. delivered the opinion of the Court. The only queſtion is whether *John's* third part, (who died in the teſtator's life-time,) is to be conſidered as a lapſed deviſe, and ſo will belong to the leſſors of the plaintiff who are heirs at law to the deviſor, or whether it ſhould go to *Mary* the defendant, who is the general reſiduary deviſee, to whom the teſtator has given all his eſtate both real and perſonal not before deviſed. The word *eſtate* will carry any intereſt in the land which was not before diſpoſed of; and as this depends upon the intention of the teſtator, this deviſe muſt be determined on theſe three rules: 1ſt. That the intent is to take place when it does not contradict any rule of law. 2dly, That the intent ought always to be taken as things ſtood at the time of the teſtator's making his will; and that it ought not to be collected from the ſubſequent accidents which the teſtator could not foreſee at the time of making his will. 3dly, When the teſtator has given all his eſtate and intereſt in ſeveral lands ſo that nothing remains undiſpoſed of, if he ſhould die, nothing can paſs to the reſiduary deviſee. As to the firſt rule; as it has been ſo long eſtabliſhed, I ſhall cite no caſe to ſupport it; but only ſay, here is no rule in the way of the leſſors of the plaintiff, but there is one to help them, *viz.* that an heir at law ſhall not be diſinherited unleſs the intent be manifeſt and apparent. And it will be difficult to ſhew how the heir ſhall not have *John's* part; but it is plain his intent was that he ſhould have it; becauſe had his intent been contrary, he might upon *John's* death have made a new will and have given it from his heir at law to his reſiduary deviſee. As to the ſecond rule; that needs no authority. Lord *Talbot's* determination in the caſe of *Hopkins* v. *Hopkins*,

kins,† is of great authority, and indeed would ſtagger me much, did it not contradict this rule; but I think it does not. The caſe was thus.—The teſtator *John Hopkins* gave the eſtate to *Samuel* ſon of his couſin *John* (who was his heir) for life, and to his firſt and other ſons in tail male, and in default thereof, to the ſons of *Sarah* daughter to his couſin *John*, with remainders over to perſons *in eſſe*. *Samuel* died before the teſtator and without iſſue. *Sarah* was unmarried at the time of the death of *Samuel*; and the queſtion in that caſe was, whether the deviſe to *Sarah*'s ſons was a contingent remainder, and therefore void, or an executory deviſe. It certainly was a contingent remainder at the time of the will; but *Samuel* dying before the teſtator, Lord *Talbot* held it an executory deviſe and therefore good, and that the eſtate in the mean time till *Sarah* had a ſon, veſted in the heir at law. All therefore Lord *Talbot* determined was, not that the intent of the teſtator ſhould be altered, or that a ſubſequent accident would alter his will; but that the ſubſequent accident altered the law. He likewiſe determined this in favor of an heir at law, who otherwiſe muſt be diſinherited intirely. Therefore that caſe does not differ from this rule.—It was mentioned at the bar that the caſe of *Aſhburnham* v. *Bradſhaw*‡ was againſt it; which was a caſe referred to all the judges on the *Mortmain* act. But I do not think that that was an expreſs authority againſt this rule; becauſe that was a conſtruction upon the wording of the Stat. 9 *Geo.* 2. But ſo far it was an authority for this rule, as all the Judges declared it to be law. There were ſeveral caſes cited in the argument of that caſe of *Aſhburnham*'s in ſupport of it, as *Barker* v. *Cooke*, where it was agreed to be law. As to the third rule; It is not only agree-

† Cas. T. Talbot 44.

‡ 2 Atk. 36. Barnard. Cha. 6.

able to reaſon, but eſtabliſhed by three modern caſes of very good authority, firſt, that of *Goodright* v. *Opie* † which was firſt argued in B. R. M. 7. Geo. 1. and determined E. 9. Geo. 1. That caſe was, a deviſe of lands to four perſons and their heirs, as tenants in common and not as jointenants, and then the teſtator gives all his goods and chattels, and all his eſtates both real and perſonal of what nature or kind ſoever (in fuller words than in the preſent caſe) to *Opie*, as reſiduary deviſee. One of the firſt deviſees died four years before the deviſor. The leſſor of the plaintiff was heir. Lord Ch. J. *Prat* and *Powel* J. were of opinion for the heir, and *Forteſcue* and *Eyre* for the reſiduary deviſee; and therefore it was inſiſted at the bar that this was no authority, as the court was equally divided. But this caſe is now a very good authority; for my brother *Forteſcue* changed his opinion in this Court, in *Wright* v. *Horne* ‡; and *Eyre* alſo afterwards changed his opinion in this Court in *Roe* v. *Flood*, in which brother *Forteſcue* alſo joined him. The ſecond authority is *Wright* v. *Horne* which being on a caſe is not amongſt the records. *A.* deviſed lands to *F. Carter* and his heirs, and other lands to ſeveral others in fee, and then follow theſe words "And all the reſt and reſidue of my lands and tenements &c. I give to *J. Lomax* and his heirs for ever." *F. Carter*, who was the firſt deviſee, died before the teſtator, and this was held a lapſed deviſe, and that it ſhould go to the heir, and not to the reſiduary deviſee; and Lord *King* ſaid that though the will was not complete ſo as to paſs any thing to *F. Carter* till the death of the deviſor, yet his intent was to be taken as things ſtood at the time of making the will; for every man makes his will as if he was to die the next moment, therefore it is not alterable by contingencies which the deviſor could not foreſee. The third

† 8 *Mod.* 123. cited 1 *Ves.* 141. Ambler. 328. 329.

‡ 8 *Mod.* 221. *Fort.* 182. *Wright* v *Hall.*— Ambler. 329.

third authority is *Roe* v. *Flood*,* C. B. M. 1727. *A.* deviſed lands to *R. Biſhop* and his heirs upon condition to pay debts, &c. and at the latter end of his will, he gives all the reſt and reſidue of his real and perſonal eſtate not before deviſed to *Elizabeth Flood* the defendant. *R. Biſhop* died before the teſtator, and it was adjudged by the whole Court that the heir ſhould have the land, and not the reſiduary deviſee; for it muſt be underſtood "all the lands not diſpoſed of at the time of making the will;" and the caſe of *Wright* v. *Horne* was there relied on. If then the caſe before us were a new one, I ſhould be of the ſame opinion as the judges were in that; and I am always glad when my ſentiments are ſupported by former authorities. The only queſtion is, therefore, whether any eſtate or contingent intereſt remained undiſpoſed of at the time of making the will? But upon conſideration we are all of opinion that nothing remained undiſpoſed of at that time. For the eſtate in queſtion, and which is ſuppoſed to be reſiduary land, would have veſted in *John* at the time of the deviſor's death, if *John* had lived, and therefore have deſcended to his heir, though he had not been twenty-one. For the word "*then*" does not date when the intereſt is to veſt, but when it is to fall into poſſeſſion; and it is the ſame thing as if he had given the eſtate to *William* and *Anne* for a term of years, and *then* to *John* and his heirs: yet if *John* had outlived the deviſor, the eſtate would have veſted in *John*; and though *John* had died within the term, yet there could be no doubt but the reverſion would have deſcended to his heirs. And in this we are warranted by two great authorities in point, the one antient, the other modern. The firſt is *Boraſton*'s

* Fort. 284.

Goodtitle v. *Whitby*. 1 Bur. 228. S. P.

case 3 *Co.* 19. The last is *Manfield* v. *Dugard, Eq. ab.* 195. which is grounded on *Borafton's* case.—— There have been variety of opinions, whether the first taker for years should hold till the sons would have come to twenty-one years, if they had lived; or should hold no longer than until the time of their deaths. But there is no occasion to give an opinion on this point, it being found by the verdict that *John* would have been twenty-one, at the time of the demise in the declaration. There were two objections made by the defendant's counsel, which are proper to be taken notice of. First; that the testator intended that *William* and *Anne* should have 10*l. per ann.* out of *all the premisses* for life, whereas by giving *John*'s part to the heir at law, they will lose one third part. Secondly; the testator has directed the residuary devisee to pay debts, &c. and it is said that this fund, of the residue, may be insufficient to do this. There was an endeavour to answer this, at the bar; first that the estate would pass *cum onere* to the heir. But clearly not; as he does not claim under the will. But the true answer it, that it is a *casus omissus*, which the testator did not foresee; and we are only to construe his will, and not to make one for him. And the devisor did not intend that this contingent interest should be subject to his debts, for he could not foresee that this accident would have happened. And should we construe the estate to belong to the residuary devisees, it would be liable to the same objection, that *William* and *Anne* would not have had the whole 10*l.* for their lives; neither would the estate have been liable to the debts, if *John* had outlived the testator; for his share would not have been liable.

Gilb. Eq. Rep. 36.

Judgment for the Plaintiff.

A TABLE

A

TABLE

OF THE

PRINCIPAL MATTERS

Contained in the preceding CASES.

Abatement.

IN declaration in prohibition to a ſuit againſt huſband and wife for marrying clandeſtinely, the death of the huſband before judgment is no abatement. *Page* 57

In the ſame caſe if the ſuit had abated at common law, it is continued by ſtatute of 8, 9 *W.* 3. *c.* 11. 58

Account.

In account the firſt judgment muſt be *quod computet*; and if a final one be firſt entered, it is irregular. 19

Action.

Debt as well as covenant lies for a certain ſum covenanted to be paid *per* month as long as a ſhip ſhall be out, on an averment of the time. *Page* 156

Action by one as executor, and alſo in his own right, not maintainable. 358

An action upon a note for paying a certain ſum at ſeveral days maintainable, though brought before all the days are paſt. 370

In *indebitatus aſſumpſit*, in an inferior court for work and labour, it is neceſſary to ſhew

ſhew the ſame to be done within the juriſdiction. *Page* 161, 162

Additions.

See Tit. *Excommunicato capiendo.*

Appearance.

Pleading.

Adminiſtrator.

An adminiſtration taken out by an executor *de ſon tort*, relates to the inteſtate's death, and warrants a retainer. 333

But an action brought againſt him afterwards as executor *de ſon tort*, is maintainable. 333

Admiralty.

The admiralty hath no juriſdiction in ports or havens, unleſs in caſes of death and maihem, by ſtatute of *R.* 2. And in theſe the common law hath a concurrent juriſdiction. 233

Affidavit.

On motion for entering up judgment upon an old warrant of attorney, an affidavit of the execution by the party himſelf is ſufficient *Page* 53

And if it be ſworn that the debtor was living a few days before, it is ſufficient. 53

In the ſame caſe, an affidavit that the money was due on the warrant of attorney, and on other ſecurities, is well enough. 53

Where an arreſt is made on an imperfect affidavit, an explanatory one may be afterwards made. 71

Upon motion for an information the affidavit is not intitled; otherwiſe on ſhewing cauſe, unleſs it be ſworn in court. 313

In ejectment, an affidavit intitled in the name of the caſual ejector, is not ſufficient to ſupport a rule in the name of the tenant in poſſeſſion. 368

Upon motion to enter up a ſuggeſtion on 3 *J.* 1. *c.* 15. an affidavit, "that the "plaintiff is a citizen and "bricklayer of *L.*" is ſufficient; without ſhewing, that he was ſo at the commencement of the action. 377

Upon motion for an information for publiſhing a libel, on

on an affidavit of the party's having confeſſed the publication, a denial of the confeſſion alone is not ſufficient. *Page* 384

Alien.

An alien-friend may maintain a perſonal action; otherwiſe of an alien-enemy. 76

Amendment.

A declaration amended after carrying down the cauſe by proviſo. 13

Where a declaration is amended after plea, the defendant may always plead *de novo.* 14

Whether a *diſtringas juratorum* is amendable, (the *venire facias* being right) by 8 *H.* 6. *c.* 9. or 5 *G.* 1. *c.* 13. 68

A writ of inquiry amended by ſtriking out the words [by occaſion aforeſaid], and inſerting [by reaſon of not performing the undertakings above-mentioned.] 77

But *Q.* Whether this ought to be done without coſts. 79

In *quo warranto* for acting as bailiff, &c. the plea amended in ſtating the conſtitution of the corporation after iſſue joined, and going down to trial. *Page* 110

A declaration in ejectment, as to the time of the demiſe and the parcels, is not amendable. 208

A ſet-off amended by conſent. 208

A plea by an executor amended, by adding a *profert* of the letters teſtamentary, after joinder in demurrer, and the cauſe put in the paper. 305

Where plaintiff declares for 10*l.* damages, and the jury find 30*l.* the declaration is not amendable by inſerting 30*l.* for 10*l.* 351

Q. Whether an amendment is to be allowed after error brought, on what terms. 351

A writ of enquiry amended by making the return agreeable to the award on the roll 362

A plea amended after replication. 381

Where the verdict and judgment are for more damages than plaintiff counts for, the judgment is not amendable in a ſubſequent term. (By three judges againſt one). 387

Appearance.

See Tit. *Error.*

Judgment.

The want of addition is not cured by appearance. *Page* 147, 148

Attachment.

Attachment lies for ſerving proceſs on one whilſt he is attending the trial of his own cauſe. 275

Attorney.

See Tit. *Stat.* 2 *G.* 2. *c.* 23.

Authority.

A warrant of attorney for entring up judgment revoked by the death of the party. 53, 55

Award.

An award cannot be ſet aſide for defects appearing on the face of it. 297

But an attachment is not grantable for non-performance of ſuch an award. 297

The miſbehaviour of arbitrators is no impediment to the granting an attachment for non-performance of an award. *Page* 299

An attachment is not grantable for non-performance of an award, if an action is brought thereon. 299

Bail.

IN debt on judgment, the plaintiff is not intitled to ſpecial bail if the original debt was not 10*l.* though with the coſts it amounts to more. 15

And in the ſame caſe defendant was diſcharged, after having put in bail above, and ſurrendered. 15

Where judgment is obtained in trover againſt one defendant, and afterwards trover is brought by the ſame plaintiff againſt another defendant for the ſame goods, he is not intitled to bail againſt this laſt. 18

A perſon committed for felony, is intitled to bail after a trial is loſt, eſpecially if it be doubtful whether he is guilty. 64

Special

Special bail lies in an action on the game-act of 9 *A. c.* 14. brought by the loſer. *Page* 70

But *Q.* whether it be not otherwiſe in an action brought by an informer. 71

Special bail does not lie in actions brought on penal ſtatutes. 71

Bail not allowable on a commitment for a contempt. 98

Where a bail-bond is aſſigned after the death of defendant, and a declaration delivered, the proceedings ſtayed. 37

And ſo they ought to be, if the bond is aſſigned in the life-time of the principal, and he dies before judgment. 374

Baron and feme.

If the huſband hath had no acceſs to his wife, her iſſue may be baſtardized. 9

An huſband *de facto* is intitled to the wife's property, and liable to her debts. 227, 228

In *indebitatus aſſumpſit* againſt huſband and wife, on a promiſe of the wife before marriage it is an ill plea that they were never joined in lawful matrimony: So held on demurrer. *Page* 227

But in this and all other perſonal actions, the fact of the marriage muſt be denied. 227

In treſpaſs againſt huſband and wife and others, for entring into plaintiff's houſe, and converting his goods "to their uſe," the count is good. 242

Otherwiſe in trover. 245

By-law.

A by-law made (in *London*) under a cuſtom, that no brewer, drayman or brewer's ſervants, ſhall be in the ſtreets but within particular hours, a reaſonable regulation of trade, and good. 92

And this notwithſtanding the 15 *Car.* 2. *c.* 11. which enacts (for the ſupport of the revenue) that no brewer ſhall deliver beer but within particular hours, the time being narrowed by the by-law. 92

Where by charter the mayor is to be choſen by the corporation out of the burgeſſes generally, a by-law for their nominating three perſons

ſons to be choſen mayor is good. *Page* 119

Certiorari.

A *Certiorari* is not grantable at the inſtance of a defendant without a reaſon. 27

It is a ſufficient reaſon for granting a *Certiorari* to remove an information before Juſtices of aſſize, that they have no juriſdiction in the cauſe. 27

Where orders are made for the removal of *A. B.* and *E.* his wife and two daughters, and the children of *A. B.* and his ſaid wife, a *certiorari* to remove orders "for the removal of *A. B.* "and *E.* his wife and of "*A.* B." is ill. 73

A *certiorari* lies for removing orders before an appeal, at the inſtance of the party who is ſolely intitled to the appeal. 343

But where the time of appealing is fixed, and more than one is intitled to appeal, no *certiorari* lies at the inſtance of one party till the time is expired. 344

Where orders are made for appointing overſeers, and alſo for convicting the for refuſing to act, one *certiorari* lies for removing all the orders. *Page* 343

Charter.

Where by letters patent of 17 *ſ.* 1. after reciting that by charter of Queen *Eliz.* the mayor, jurats and commonalty, [inſtead of mayor and jurats] may chuſe jrats out of the inhabitants, and by charter of 2 *ſ.* 1. out of the freemen only, therefore to prevent all doubts, *&c.* it is directed, that "it ſhall and may "be lawful for the mayor, "jurats and commonalty, "to chuſe jurats out of the "inhabitants," *&c.* the right of election is in the mayor, jurats and commonalty. 293

And the miſrecital does not hurt the grant. 295

Where a charter directs jurats to be elected by the mayor and jurats out of the freemen, and a ſubſequent charter directs the election to be by the mayor, jurats and commonalty, out of the inhabitants, a freeman as well as inhabitant muſt be choſen a jurat by the mayor,

mayor, jurats and commonalty. *Page* 295

Condition.

Where *A.* is bound with condition to pay ſo much to *C.* as *B.* ſhall be awarded to pay *C.* and it is awarded that *B.* ſhall give a note for paying money to *C.* or order at a future day, this is within the condition. 28

Contempt.

See Tit. *Attachment.*

Conviction.

See Tit. *Evidence.*

5 *A. c.* 14. and other ſtatutes.

In convictions, the evidence muſt be ſet out: Otherwiſe in orders. 81

Where ſeveral reaſons of conviction are ſet out, ſome of which are good, and others not, the conviction is ill. 85

Where in a conviction for keeping an alehouſe without licence, a general licence only is ſet out, and defendant convicted, becauſe the licence was not granted at a general meeting, (as required by 2 *G.* 2. *c.* 28.) the conviction is ill, for want of ſhewing ſufficient evidence. *Page* 82

A conviction upon 5 *A. c.* 14. for keeping ſetting dogs, &c. quaſhed, becauſe made upon the evidence of the informer only. 240

Exceptions to a conviction on 5 *A. c.* 11. for keeping ſetting dogs, &c. 240

In convictions, on ſtatutes, it is not neceſſary to ſhew that defendant is not exempted in the act, where the exemption is by way of proviſo; as in 9 *G.* 2. *c.* 23. 289

Otherwiſe where the exemption is in the enacting clauſe. 289

Where a conviction ſet out, that *T. B.* informed, that 9 *May* defendant killed a deer, and that *W. S.* 10th of the ſame month ſaw a deer in his cuſtody, and defendant owned, that "on "the day then before" he killed the deer then in his cuſtody; though this does not ſhew he killed the deer mentioned in the information: yet as it ſhews he killed the deer in his cuſtody, the conviction is good: And the words [then before] are to be underſtood of the day next before. 301, 302

Coroner.

See Tit. *Information.*

Upon an untimely death, it is proper for the coroner immediately to have notice thereof, and to take a view, whilſt the body is in the ſame ſituation as when the perſon died. *Page* 235

Coſts.

In no action but ejectment the proceedings are to be ſtayed till payment of the coſts of not going to trial though the plaintiff be neceſſitous. 17

In caſe of a ſpecial jury, the loſer muſt pay all the coſts of the jury ſubſequent to the ſtriking. 51, 53

Where in declaration in prohibition to a ſuit againſt huſband and wife for marrying clandeſtinely, the prohibition (after the huſband's death) is ordered to ſtand as to part, and a conſultation to go to the Reſidue, the wife is intitled to coſts, upon 8, 9 *W.* 3. *c.* 11. 57

And in the ſame caſe, the coſts attach from the motion for the prohibition. 60, 61

Two judgments cannot be given for coſts at common law; otherwiſe in equity. *Page* 60

The houſe of lords gives coſts according to the ſtatutes. 60

If huſband and wife are ſued in court-chriſtian for a clandeſtine marriage, and the huſband dies, the wife is ſubject to coſts from the beginning of the ſuit. (*Per Probyn* juſt.) 61, 62

Where judgment for the plaintiff in an action on the ſtatute of uſury is affirmed in error, the defendant in error is intitled to coſts, by 3 *H.* 7. *c.* 10. though no coſts or damages are recoverable below. 114

Upon affirmance in error of a judgment obtained by a plaintiff in ejectment, the court above may give judgment for coſts, without a writ of inquiry, notwithſtanding the ſtatute of 16, 17 *Car.* 2. *ſeſſ.* 2. *c.* 8. 153

But in the ſame caſe no judgment can be given for damages for waſte, or for meſne profits, without ſuch writ, by the ſaid act. 156

Where a conviction for deerſtealing is affirmed on *certiorari*,

tiorari, the profecutor is intitled to taxed coſts only, on 3 *W. & M. c.* 10. *Page* 352

Where a plaintiff-executor ſhews a cauſe of action accrued to himſelf ſince his teſtator's death, he is ſubject to coſts. 359

So where he hath cauſe of action as executor, and another in his own right. 359

Where in *aſſumpſit* plaintiff declares, that whereas his teſtator had drawn, *&c.* ſeveral writings, *&c.* for defendant as an attorney, and had laid out 20*l.* on his account, and that whereas the plaintiff as executor had laid out 20*l.* for defendant, and had finiſhed the ſaid buſineſs, the defendant after teſtator's death had promiſed to pay, *&c.* the plaintiff (upon being nonſuited) muſt pay coſts. 356

Where an action is brought by an executor upon an intire contract made and begun by his teſtator, and perfected by himſelf, he is not liable to coſts. 361

Where an action is brought for words, not in themſelves actionable, with a conſequential damage, and leſs damages than 40*s.* are given, plaintiff is intitled to full coſts. *Page* 375

Otherwiſe if the words alone are actionable. 375

Covenant.

Where diſcharged or repealed by act of parliament, ſee *ſtat.* 7 *G.* 1. *c.* 28.

Counſel.

Where a cauſe in the paper hath been argued, and ſtands over on an *ulterius conſilium*, and a new judge is made, it muſt not be argued by the former counſel. 31

Otherwiſe where it ſtands over on a *cur' adviſare vult.* 31

County-palatine.

Of the juriſdiction of counties-palatine. 191 *to* 199

Upon a *latitat* out of the *K. B.* into the county-palatine of *Durham*, the officer there muſt make out a mandate and an attachment granted againſt him for refuſal. 191

In all perſonal actions, both local and tranſitory, the courts of *Weſtminſter-hall* may

may hold plea thereof, if there be no plea to the juriſdiction. *Page* 196 *to* 199
Otherwiſe of real actions brought for lands in the county-palatine. 198

Court.

The court will not take judicial notice of any other judges but its own. 74

Court of arches.

An appeal lies to this court from a petition to the ordinary, for a licence for ſetting up a monument. 69

Court-leet.

The jury of a leet cannot preſent things done after the adjournment, but only ſuch as happened before or during the ſitting of the court. 48
The jury cannot enter into ſhops to examine weights and meaſures, but can proceed only by way of ſummons. (*Per Probyn juſt.*) 48
Where the jury of a leet are obſtructed in entering into a ſhop to examine weights, an amercement, and not a fine, is proper. 49
And the court may amerce. *Page* 49
And in the ſame caſe *al.* 198. is a reaſonable aſſeſſment. 49
An amercement may be general. 49

Cuſtoms.

Where a pariſh conſiſts of four vills, a cuſtom that the inhabitants of one of them pays two thirds, and of the other three one third, to the church-rates, is good. 32
And in the ſame caſe, if an inſufficient reaſon of the cuſtom is ſhewn in pleading, yet as the cuſtom is good on the face of it, ſufficient on demurrer. 32
By cuſtom there may be two church-wardens for one vill, and one church-warden for three vills in the ſame pariſh. 32

Damages.

See Tit. *Coſts.*

DAMAGES cannot be remitted after judgment. 385

Debt.

Debt lies on a Charter-party. *Page* 156

Debts.

Where *A.* is indebted to *B.* for rent, both in his own right and as adminiſtrator, and he firſt pays money to *B.* as adminiſtrator, and afterwards another ſum generally, *B.* may apply the laſt as he pleaſes. 55

Declaration.

See Tit. *Hue and cry.*
Pleading.
Verdict.

The memorandum need not mention the ſpecies of action brought, as *de placito debiti*, &c. 23

In debt for an amercement in a court-leet for obſtructing the jury in examining weights, it ſhould be ſhewn that they were not examined before. 48

In the ſame caſe it ſhould be ſhewn, that the attempt to enter a ſhop to examine the weights, was made at a reaſonable time. 48

And in the ſame caſe, the obſtruction being alledged to be made 1 *Decemb.* and the preſentment appearing to be of an obſtruction made 9 *May*; this is ill, the facts being different. (*Per Chapple* juſt.) *Page* 50

Where in an action *qui tam* on 9 *A. c.* 14. againſt gaming, the declaration concludes thus, [by which the action accrued to the King, the poor and the informer]; this is good, tho' the action be given to the informer only. 67

Where in debt on a charter-party for paying 52*l.* 10*s.* for every calendar month a ſhip ſhall be out, the plaintiff ſhews that the ſhip was out from 26 *May* 1723. to 9 *May* 1724. and avers, that the money came to 652*l.* 10*s.* (which is a miſcalculation); this ſhall not hurt; and the debt ſufficiently appears. 156

In action on the caſe in *K. B.* againſt an attorney a declaration concluding [and therefore brings ſuit] is good; otherwiſe in *C. B.* 247

In falſe impriſonment, if it be ſet out that defendant impriſoned plaintiff for a long time generally, or without ſpeaking of the time.

time, this is ſufficient after verdict. *Page* 252
And ſo it is upon demurrer. (*Per Probyn juſt.*) 252
Where in treſpaſs in *K. B.* there are two counts, the firſt of which is laid poſitively, and the other under a [whereas]. *Q.* if ill. 282
In action on a note for paying money by inſtalments, the count muſt be only for ſo much as is become due. 370

Demurrer.

A variance between a writ and count cannot be taken advantage of, without praying *oyer* of the writ. 75
There cannot be a demurrer in abatement, and why. 147
An indictment may be demurred to for want of an addition; otherwiſe if there be an ill addition. 137 *to* 150
A demurrer may be after an imparlance. 150

Deviſe.

Where *A.* is poſſeſſed (*inter alia*) of lands of 100*l. per ann.* under a truſt-term for paying him 500*l.* and the intereſt of other 500*l.* after which ſaid term the premiſſes are ſettled upon *B.* for life, (but without warranted by precedent articles) remainder to *A.* in fee; and *A.* is alſo intitled to other lands in fee, expectant on an eſtate-tail veſted in *H. P.* and his wife, ſubject to the payment of 2000*l.* to his three ſiſters; and he deviſes all his lands to *Eleanor* (his ſiſter of the whole blood) "except the "reverſionary eſtates after "mentioned;" and then reciting that he was intitled to the reverſion of all the family eſtates "after the "death of *H. P.* and his "wife," and that the ſame were in the poſſeſſion of *H. P.* he gives the ſame to *Eleanor* and his two other ſiſters (of the half blood) equally in fee: And afterwards reciting that "the "ſame reverſionary eſtates" are charged with 2000*l.* to his three ſiſters, he directs that the ſame ſhall be diſcharged by the ſaid deviſe: In this caſe the lands of 100*l. per ann.* paſs to *Eleanor.* *Page* 201, 202
Where teſtator wills that his lands ſhall go to his two younger brothers *R.* and *M.* to

to be divided between them; and if *R.* ſhall have no iſſue male, then his whole lands and eſtate ſhall go to *M.* in tail male, he paying 200*l.* to the daughters of *R.* after the ſame eſtate ſhall fall to him; and if *M.* ſhall have no iſſue male, then his lands ſhall go to his nephew *T.* and his heirs, he paying 200*l.* to the daughters of *R.* and *M.* reſpectively after the eſtate ſhall fall to him; and if *T.* have no iſſue male, then "his ſaid eſtate" ſhall go to the daughters of *R.* and *M.* and if they have none, then to the daughters of *T.* and if he have none, then to teſtator's heirs; an eſtate for life only paſſes to the daughters of *R.* and *M.* the word [eſtate] being here deſcriptive only. *Page* 210

A deviſe after the death of teſtator's wife to ſuch child as ſhe is ſuppoſed to be pregnant with, and to the heirs of ſuch child, is a good deviſe. 263

Where a term is deviſed to ſuch child, as teſtator's wife is ſuppoſed to be pregnant with, and to the heirs of ſuch child for ever, provided that if ſuch child ſhall die before twenty-one, having no iſſue, then the reverſion is deviſed over; this laſt deviſe is good, though there was no birth or pregnancy. *Page* 263

And the deviſe over is good as an executory deviſe. 263

A deviſe of a term to one and his heirs, carries the whole. 268

A term is deviſed in truſt for *B.* and *B.* for their lives, and after their deaths in truſt for their firſt and other ſons and their heirs male, and for want of iſſue male, to the daughters of *A.* and *B.* and if there be no iſſue of the ſaid marriage, in truſt for the iſſue of the ſurvivor; but if they die without leaving any iſſue, in truſt for *S. S.* for life, and then in truſt for all ſuch children as *J. S.* ſhall leave living, or his wife *enſeint* with, that ſhall attain twenty-one, their executors, &c. *A.* and *B.* died without iſſue, and *J. S.* died in the life-time of the ſurvivor, leaving iſſue then twenty-one years old; *Q.* whether the limitation to ſuch iſſue is good as an executory deviſe. 333

Diſcontinuance in pleading.

Where a diſcontinuance is on the *niſi prius* roll, yet if there be none on the plea roll, it is well enough. *Page* 67

Diſſeiſin.

Receipt of rent by a ſtranger is no diſſeiſin. 327

Ejectment.

EJectment lies of a beaſt-gate. 106
And of a common, which muſt be taken to be appurtenant. 107
So of things known in the country, where the action is brought. 107
Where a diſſeiſee enters within five years to avoid a fine, and brings an ejectment, laying the demiſe before the entry, the action is not maintainable. 125
Where an ejectment is brought in *C. B.* and afterwards another in *K. B.* on the ſame title, and for the ſame lands, the court will ſtay the laſt till the other is determined. 298
Where an ejectment is brought for non-payment of rent, the court did at common law ſtay the proceedings on payment of the rent. *Page* 343

Enquiry.

Where a writ of enquiry is neceſſary, & *contra*, ſee Tit. *Coſts.*

Error.

See Tit. *Irregularity.*

Where the plaintiff's name is omitted in the writ, defendant may apply after appearance to ſet aſide the proceedings. 16
Otherwiſe if the ſervice of the writ is irregular only. 16
The omiſſion in the memorandum of the cauſe of action is not erroneous. 24
And ſo it is where the award to the ſheriff is general without mentioning of what county. 24
Where a writ of enquiry in *C. B.* is teſted by the C. J. of the *K. B.* this is not error, but only irregularity, unleſs it appears on record that he was not then C. J. alſo of *C. B.* 74
Affinity between the defendant and ſheriff is not aſſignable by the defendant for error. 91

But

But Q. whether it be not assignable for error by the plaintiff. *Page* 90, 91
If defendant pleads double without leave of the court, this cannot be taken advantage of on demurrer as error; but only upon motion, as an irregularity. 108
Error does not lie in the Exchequer of an award of execution in a *scire facias*. 288
But if it be *tam in redditione judicii quam in adjudicatione executionis*, it is good. 288
Upon bringing error in the Exchequer on an award of execution in a *scire facias*, (which is wrong) the proper motion is not to quash the writ, but for leave to take out execution. 288

Evidence.

See Tit. *Record.*
Inspection.

The evidence of the wife alone is not sufficient to prove no access in the husband, in order to make a settlement for the issue as bastards. 9
The evidence only of the person intitled to the benefit of a conviction is not sufficient to support it. 18
On motion for bailing persons indicted of felony, the court will receive affidavits of the defendants themselves. *Page* 64
In trespass for an entry, &c. upon not guilty pleaded, a freehold may be given in evidence. 109
Where one jury sets out a special verdict found by another, the facts comprised in such verdict are no evidence. 172
Where plaintiff shews in evidence that *A.* died a papist, and that *B.* his heir (from whom plaintiff claims by descent) renounced the popish religion; and defendant shews a will of *B.* under which he claims; and then plaintiff proves that *B.* died a papist; this is consistent with his former evidence. 222, 235
Where the conformity of a papist to protestantism is shewn by record, parol evidence may be given of his dying a papist. 222, 236
An informer cannot be a witness on a conviction for keeping setting dogs, &c. upon 5 *A. c.* 14. 240
Where written evidence is produced, the other side may have the whole read,

after ſuch parts thereof are read as the party producing it directs. *Page* 259
Where the ſtatute of 3 *W.* & *M. c.* 10. requires the confeſſion of the party, or the oath of one or more witneſſes before the juſtice, &c. a conviction founded on a confeſſion made to the witneſs, is good. 302
Proceedings in Chancery cannot be read upon motion, unleſs authenticated by affidavit. 313
The receipt of rent by a perſon having no right, is not ſufficient proof of poſſeſſion. 327
Otherwiſe of rent received by one having right. 327
In *quo warranto* againſt one for acting as bailiff, a judgment of ouſter againſt the perſons under whoſe nomination he was choſen may be given in evidence. 388
But the ſame is not concluſive. 388

Excommunicato capiendo.

Exceptions to an *Excommunicato capiendo.* 220
This writ may be quaſhed without the party's bringing an *habeas corpus.* 220
Where two are excommunicated for two diſtinct crimes, and the ſheriff is commanded to take and keep them both, "until "they make ſatisfaction," this ill. *Page* 221
In an *Excommunicato capiendo* for non-appearance in a cauſe of incontinence, there muſt be an addition. 221
Where the writ ſets out the party to be excommunicated in a cauſe for adultery, fornication or incontinence; this well enough though in the disjunctive. 221

Execution.

An execution on a final judgment in account, where the judgment ſhould have been *quod computet*, is not to be ſet aſide whilſt the judgment remains. 20
Where upon a trial in term judgment is ſigned after term, and a *ca. ſa.* is teſted the firſt day of the ſame term, and returnable the laſt, and a *teſtatum capias* is teſted the laſt day of the ſame term, and returnable the firſt day of the term after, theſe executions are regular. 309

Executor.

An executor *de ſon tort* of an executor *de ſon tort* is not liable for a *devaſtavit* by the common law, nor by the 30 *Car.* 2. *c.* 7. *Page* 252

Where a judgment is obtained againſt an executor by compulſion, for a ſimple-contract debt, and there are alſo bond-debts, he may diſcharge the former, if he has no notice of the other. 340

But *Q.* if the judgment be not gained by compulſion. 340

Expoſition.

See Tit. *Charters.*

Condition.

Mandamus.

Of the word [inhabitant]. 39

Of the word [void] in acts of parliament, ſee tit. *Stat.* 2 *G.* 2. *c.* 28.

Of *quam plurimorum.* 123, 241

Where a *latitat* commands the biſhop of *D.* "by your "writ" to command the ſheriff, *&c.* this is to be underſtood of ſuch writ as by law he may iſſue. 196

Fine.

See Tit. *Remainder.*

TO avoid a fine, an actual entry is neceſſary, and an entry in ejectment is not ſufficient. *Page* 125

If a diſſeiſor levies a fine, diſſeiſee has no title before entry. 125, 136

A fine by tenant for years *nil operatur.* 327

Difference between a fine and feoffment. 327

Guardianſhip.

THE care of infants originally belonged to the court of Chancery, and by the diſſolution of the court of wards became reveſted therein. 313

A guardianſhip in ſocage, or under an appointment in Chancery, does not end at fourteen, unleſs another be then choſen or appointed. 313

Habeas corpus.

UPON an *habeas corpus* for bringing up a perſon committed for breach of the peace,

peace, it is a ſufficient return that he was diſcharged out of cuſtody by an order of ſeſſions. *Page* 281
So if it had been returned generally, that he was out of the gaoler's cuſtody. 281

Hue and Cry.

In an action of hue and cry, a declaration concluding, "*contra formam ſtatuti,*" and not "*ſtatutorum.*" is good, the action being founded on the ſtatute of *Winton.* 115
And in the ſame caſe, where the bond is ſet out to be given before *S. C.* "ſecon-" dary of *E. V.* chief clerk "to inrol pleas;" this is a good deſcription, tho' the ſtatute of 8 *G.* 2. *c.* 16. uſes the word [ſecondary] only. 115
In the ſame caſe, where it is ſet out that the party went before *S. C.* ſecondary, without the word [then], this ſufficient, eſpecially after a verdict. 116
And it is ſufficient to ſay, that the bond was given to *J. H.* high conſtable, without averring that there was but one. 116

Indictment.

See Tit. *Information.*

Judgment.

Words.

Where an indictment is removed from an inferior court, there is no neceſſity of ſhewing in the caption by what authority the court is held. *Page* 137
But it is neceſſary to ſhew a juriſdiction in the matter returned. 137
Therefore where an indictment is ſet out to be taken before Sir *J. T.* mayor of *L.* and conſervator of the *Thames, &c.* it is inſufficient, becauſe *non conſtat* he had power to take indictments. 137
In indictments figures muſt not be uſed, eſpecially in material parts. 137 *to* 148
Indictments are not void, but voidable only, for want of addition. 146
And how the want of addition may be taken advantage of, ſee tit. *Demurrer.*
If an indictment be held ill on demurrer, the judgment muſt

muſt be *quod caſſetur*, and the party may be indicted again. *Page* 147, 148, 149
Indictment for a nuiſance in the *Thames*, without ſetting out the *termini*, good. 137
So of a highway. 145
In returning an indictment, whether the jurors names muſt be returned. 139, 143
Objected to an indictment, that the words are, "the "jury did preſent," inſtead of [do]. 162
Indictment for conveying a perſon having the ſmall-pox, and leaving him at the houſe of *A. B.* in the city of *Exeter*;" and objected, that it ſhould be ſaid, "within the city and "county of *E.*" theſe not being coextenſive. 162
Objected alſo, that it ſhould be ſaid, defendant knew that the party had the ſmall-pox. 162
And that the fact was done with an ill intent, and what. 162
An indictment for keeping a houſe to entertain vagrants in, refuſed to be quaſhed, becauſe laid by way of nuiſance. 220
An indictment for ſpeaking ſcandalous words to a magiſtrate, may be quaſhed. 226
An indictment "that it was "preſented," without adding, "on the oaths of "twelve good and lawful "men," ill. *Page* 230
An indictment for maintaining a cattage for habitation, without ſhewing that it was inhabited, ill. 230
An indictment for not repairing a way, without alledging it to be out of repair, ill. 276
Indictment againſt a townſhip for not repairing a cart-way, without ſhewing that they have from time immemorial repaired it, ill. 276
Indictment for not paving a cart-way, ill. 276
Objected to an indictment upon the game-acts:
1. That it does not appear defendant was not qualified.
2. That an indictment does not lie for keeping nets, *&c.* for deſtroying game.
3. That it is not ſaid, "it was "then and there ſworn."
4. That it does not appear to what time the ſeſſions were adjourned.
And held ill. 303

Infancy.

On plea of infancy it muſt be ſhewn

ſhewn in the replication that the goods, &c. were neceſſary for the infant perſonally. *Page* 277

Therefore where in an action for phyſick for horſes defendant pleads infancy, and plaintiff replies, that the phyſick was neceſſary for the horſes; this is an ill replication. 278

Otherwiſe if it had been replied, that the phyſick was neceſſary for the uſe of defendant; or that the phyſick was for the horſes kept by defendant for his neceſſary uſe. 278

Horſes may be neceſſary for an infant. 278

Information.

See Tit. *Indictment.*

Stat. 21 *Jac.* 1. *c.* 4.

An information *qui tam* for non-reſidence refuſed to be quaſhed, though found before juſtices of aſſiſe, who have no juriſdiction. 174

Information exhibited at the ſeſſions for uſing a trade for not ſerving an apprenticeſhip thereto, refuſed to be quaſhed. 216

Information lies for publiſhing of a juſtice of peace and alderman, that he was ſcandalouſly guilty of telling a lie. *Page* 228

Information granted againſt the captain of a man of war lying at *Portſmouth* for refuſing to let the land-coroner take an inqueſt upon a perſon hanged in the ſhip, there being none taken by the admiralty-coroner. 231

But in the ſame caſe, the information was not granted againſt the boatſwain, who acted by the captain's order 234, 235

Information granted againſt two juſtices for making an order of removal, upon a complaint only that the pauper endeavoured to gain a ſettlement contrary to law, without ſhewing that he was likely to become chargeable. 238

In the ſame caſe the order was recited to be made upon examination "before "us;" whereas the examination was before another juſtice only. 238

And the party was not ſummoned. 238

Information for non-reſidence, ſetting out defendant to be a parſon, ſufficient, without ſhewing him to be inſtituted and inducted. *Page* 291
So though the information be in the disjunctive, "parſon or vicar." 291
An information for non-reſidence cannot be brought at the aſſiſes. 28, 291

Inſpection.

In ejectment by the truſtee of a dean and chapter againſt their leſſee, defendant is not intitled to an inſpection of the books of the dean and chapter. 247

Irregularity.

See Tit. *Error.*

A final judgment is account, where it ſhould have been only *quod computet*, ſet aſide on motion for irregularity. 19
An irregularity in ſigning judgment is cured by bringing a writ of error. 296
Q. Whether it be not cured by taking out a rule to be preſent at taxing coſts. 296

Judgment.

See Tit. *Quo Warranto.*

Record.

A judgment entered up in term on an old warrant of attorney, upon the uſual affidavit, is good by relation, though the party died early in the ſame day when the rule was granted. *Page* 53
Where a juſtice of peace is found guilty of convicting without ſummons, his appearance on giving judgment refuſed to be diſpenſed with, as a thing of courſe. 152
Where in debt for 500*l.* the jury find 357*l.* 11*s.* not paid, and nothing as to the reſidue, and the judgment is that plaintiff recover "his ſaid debt." this ill. 157
A judgment on indictment ſigned by ſurprize for want of a plea, is not to be ſet aſide: Otherwiſe in a civil action. 209
Where there is a verdict for part, and a demurrer for other part, the court will not arreſt the judgment on the verdict before the demurrer is determined. 282

Nor

Nor ſtay the plaintiff from entering up judgment *Page* 284
Judgments ſigned in vacation relate to the firſt day of the preceding term. 309

Jury.

A ſpecial jury grantable at common law. 52
For bringing up a ſpecial jury to *London*, twelve guineas allowed. 52
Defendant cannot challenge the array *propter affinitatem* between himſelf and ſheriff. 85
The only method of defendant's taking advantage of an objection to the array is by challenge. 91
A challenge that the ſheriff is intereſted, *&c.* without ſhewing how, ill. 90
Where defendant challenges the array, and plaintiff demurs, the court will afterwards quaſh it, without defendant's conſent. 104
In actions on the ſtatute of hue and cry, the *venire* muſt be of the county, it not being a penal law, and therefore a caſe not excepted in 4, 5 *A. c.* 16. 115

Juſtices of Peace.

See Tit. *Information.*

A juſtice of peace ought not to grant a warrant for taking up a perſon for non-payment of wages without oath. *Page* 272
But in ſuch caſe the party ought to be ſummoned and convicted. 272
Juſtices of peace have no juriſdiction in caſe of wages, unleſs in thoſe of huſbandry. 273

King.

WHERE a *mandamus* is prayed to one as general viſitor, and is it doubtful whether the King be not ſuch, the court will not proceed without hearing the King's counſel. 177

Leſſor and Leſſee.

WHERE the leſſor is intitled to rent upon an execution ſued out by a ſtranger, ſee tit. *Stat.* 8 *A. c.* 14.

Libel.

See Tit. *Information. Words.*

The publiſhing ſcandalous affidavits, without any reflections, is puniſhable; eſpecially in the caſe of a magiſtrate. *Page* 384

Mandamus.

WHERE a *mandamus* ſuggeſts that *A.* ſerved his apprenticeſhip with *B.* "being a freeman of *C.* "and having lived during "the apprenticeſhip in *C.*" this a ſufficient averment that *B.* continued a freeman during the apprenticeſhip. 1

And if ill, the writ would be cured by the return, whereby the fact is admitted 1

Where to a *mandamus* for admitting a freeman the return admits the title, and ſays, that there are five court-days for ſuch admiſſion, and that the party had notice, and did not appear; this not ſufficient, without ſhewing theſe to be the only days. 1

Mandamus to inſtal a perſon into a prebend. 20

Mandamus lies not to grant adminiſtration *duranti minoritate* to a particular perſon. *Page* 24

Nor to grant ſuch adminiſtration, generally. 24

Mandamus lies not to make an equal poor-rate, where a rate is in being, though unequal. 24

But in ſuch caſe if an appeal be made, and the ſeſſions refuſe it, they may be compelled by *mandamus* to proceed thereon. 25

Where to a *mandamus* for reſtoring one to be a coroner, it is returned, that he was elected 29 *Auguſt*, "and "that neither then nor "ſince, nor is he yet admitted;" this is a good traverſe of the admiſſion. 105

Mandamus lies not to a viſitor to compel another to execute a ſentence of the viſitor's; but (if it lies at all) it muſt be to viſit generally. 176

Mandamus lies not to one as general viſitor, if it be doubtful whether he be ſuch or not; but this muſt be firſt determined in a ſolemn manner 176 *to* 186

Mandamus lies not to a general viſitor to execute a ſentence given by him as ſpecial viſitor. *Page* 176

Mandamus lies (on 11 *G.* 1. *c.* 4.) to a ſteward to hold a court-leet, and charge and ſwear a jury to preſent *J. D.* elected mayor, upon an affidavit of his election. 279

To a *mandamus* for granting probate, it is a good return that a ſuit is pending touching the validity of the will. 365

Mortgage.

Where money is lent on mortgage, and afterwards on bond, an ejectment brought by the mortgagee ſhall be ſtayed on payment of the mortgage money only by the mortgagor. 341

The law is the ſame in the caſe of the vendee of the equity of redemption. 341

And it makes no difference that he retains out of the purchaſe money ſufficient to pay the bond-debt, and gives bond for paying the money retained to the mortgagee, if the premiſſes are not redeemable without ſuch payment. 341

But in the caſe of an heir, he muſt pay both the money due on the mortgage and the bond. *Page* 342

At common law the court did ſtay an ejectment brought on a mortgagee, on payment of the mortgage money. 343

Motion.

See Tit. *Stat.* 8 *A. c.* 14. 9 *G.* 2. *c.* 25.

A right of viſitation, if dubious, not determinable on a motion for a *mandamus*. 186

Upon motion for an information for marrying an heireſs on 4, 5 *P. & M.* it is not neceſſary for the proſecutor to ſhew the raviſher to be above fourteen; but the contrary (if true) muſt be ſhewn *e contra*. 310

Note promiſſory.

WHERE *A.* ſells goods to *B.* who delivers and indorſes over to *A.* a note towards payment for the ſame, and *A.* gives a receipt for the goods when the note is paid; and afterwards *B.* indorſes it over; and ſix weeks after the note becomes due the drawer

er becomes insolvent, without payment; the original debt is discharged. *Page* 187

Notice.

The court will not take judicial notice of the customs of *London*. 304

Officers.

WHERE a person is sworn, and acts as mayor, without any election, he is not a mayor *de facto*; especially if recently prosecuted in a *quo warranto*. 163

Where a mayor *de facto*, against whom a *quo warranto* is pending, holds an assembly where a burgess is chosen, such election is void, unless it appears to be necessary. 119, 172

A corporation-officer *de facto* may do acts necessary for preserving the body. 124, 163

Where a *latitat* goes to a county-palatine, and it is not signed by an attorney of that county according to usage, this no excuse to the officer for disobeying the writ. 196

Orders.

See Tit. *Baron and feme.*

Evidence.

Information.

Poor.

Settlement.

Where in an order of removal by two justices, their hands and seals are not set to the adjudication, nor so mentioned, but are only in the margin, the one against the adjudication, and the other against the warrant; this sufficient. *Page* 6

Where an order of bastardy appears to be made on the evidence of the mother, [who was a feme covert] "and on other "proof;" this sufficient, though the wife's evidence alone is not good. 8

And in same case, an order of sessions made for quashing the original order, because the husband was alive, held ill; as it appeared the husband had no access. 8

An order appearing to be made on insufficient evidence is ill. 10

Order

Order of baſtardy cannot be excepted to, unleſs the party be in court. *Page* 10
An order of removal by two juſtices, with the words [and whereof] inſtead of [one whereof], ill. 57
Where an order is made by two juſtices for removal of a man and his children, and afterwards a ſeſſions order is made, ſetting out the caſe ſpecially, (which relates only to the father), and then the original order is confirmed, the laſt order is good as to the children though their ages be not mentioned. 63
An order of removal by two juſtices, with the words [both juſtices named in the ſecond aſſignment] is ill, becauſe *non conſtat*, that either was of the *quorum*. 67
And the order is not amendable, it being matter of fact. 67
An order appointing ſcavengers, (on 2 *W. & M. c.* 8.) without ſhewing them to be able perſons, ill. 72
Where an order of removal by two juſtices is ſet aſide by an order of ſeſſions, a new order cannot be made by two juſtices for removing the paupers from the place where they are ſent by the firſt order. *Page* 73
Q. Whether an order of ſeſſions, for referring the matter to a judge of aſſiſe, be a ſufficient adjournment. 73
Exceptions to an order of removal by the ſeſſions. 72
Orders are good without ſetting out the evidence. 81
In ſeſſions orders, neceſſary to ſhew the commencement of the ſeſſions. 101
But not the adjournments. 101
Where in an order a preſentment is ſtated, "whereby "it appears," *&c.* this ſufficient. 101
Where in an order for repairing a bridge, a general rate is laid on the pariſhes, *&c.* and the churchwardens are directed to aſſeſs the inhabitants; this good on 1 *A. ſeſſ.* 1. *c.* 18. 101
Where upon appeal from an order of removal by two juſtices, a ſeſſions order is made for referring the matter to a judge of aſſiſe, and it concludes, "if the judge "ſhall be of opinion, *&c.* "then, *&c.*" this not good. 72, 208
A ſeſſions order reciting the evidence only, without ſtating facts, ill. 151

Upon

Upon making an order of removal, the examination muſt be by two juſtices, and by the ſame who ſign the order. *Page* 238

Where the complaint is that *A. B.* endeavoured to gain a ſettlement, [without ſhewing that he is likely to become chargeable], this not a ſufficient ground of removal; and an information granted againſt two juſtices for making ſuch order thereupon. 238

An order for repairing a bridge, ſetting out that it is a publick bridge, and out of repair, ſufficient, on 1 *A. ſeſſ.* 1. *c.* 18. without ſhewing by whom it ought to be repaired. 285

Where an order is made for removal of a woman to the place of her laſt ſettlement, ſetting out that her huſband is a native of *Ireland*, and went abroad ſeveral years ago, and has continued ſo ever ſince, *&c.* (without ſhewing him to be dead); this an ill order. 307

But if the huſband's death had been ſhewn, the order would have been good both for wife and children. 308

If the wife has an eſtate, neither ſhe or her huſband can be removed from the place where it lies. *Page* 308

Q. Whether an appeal lies from an order of juſtices for convicting a perſon for refuſing to act as overſeer, on ſtatute of 43 *El. c.* 2. 344

Where an order of removal ſtates, that the pauper went to an eſtate he had in his own right; this does not come within 9 G. 1. without ſhewing it to be of his own purchaſe. 349

Order of removal, without ſhewing a complaint, ill. 361

Where in a ſeſſions order relating to a ſettlement, ſeveral circumſtances are ſet out inducing fraud; this not ſufficient, unleſs the fraud be expreſly found. 362

Where in a ſpecial order of ſeſſions relating to the ſettlement of a poor apprentice, it is ſtated that the indentures were allowed and confirmed by two juſtices, without ſaying "*quorum* "*unus*," not good. 371

An order of ſeſſions mentioned to be made at *Michaelmas*, and reſpited from the laſt tranſlated ſeſſions, good, without ſhewing when the latter were held. 372

Otherwiſe

Otherwiſe in caſe of an adjourned ſeſſions. *Page* 372
In a ſpecial order of ſeſſions nothing is to be intended, and the whole caſe muſt be taken to be ſtated. 372

Pauper.

A Defendant admitted to proceed *in forma pauperis* after rejoinder. 306

Pleading.

See Tit. *Cuſtom.*
Declaration.
Demurrer.
Privilege.
Treſpaſs.
Variance.

A declaration in aſſault and battery by way of recital, ill in *K. B.* 21
Otherwiſe in *C. B.* 21
Upon demurrer to a replication, though the defendant's plea be faulty, yet if it appears that the action is not maintainable, defendant muſt have judgment. 31
Where in prohibition to a ſuit for a church-rate by churchwardens, the party declares upon a cuſtom relating to the proportion and manner of payment, unneceſſary to ſhew how the churchwardens are choſen. *Page* 32
Where in prohibition it is pleaded, that three churchwardens are choſen for the pariſh, and that two are churchwardens for one vill, and the other for the other vills; this conſiſtent. 32
Where the chriſtian name varies in the court and writ, cured by defendant's ſaying [the aforeſaid]. 76
A plea that plaintiff is an alien, not ſufficient in perſonal actions, without ſhewing that he is *inimicus*. 76
Where defendant pleads not guilty, and then, "by "leave of the court accord- "ing to the ſtatute," pleads other matter, which he concludes with an averment, and afterwards ſets out other matter, the leave of the court extends to the laſt plea. 108
In action on ſtatute of hue and cry, where it is declared that the party went before *S. C.* ſecondary, without ſaying [then], this helped by verdict. 115
The want of addition cured by pleading. 146, 150

The

The want of addition, as well as a falſe one, pleadable in abatement. *Page* 146, 150
A plea of bankruptcy in the plaintiff, without concluding to the country, ill. 176
In an action againſt an infant for phyſick for his horſes, not incumbent on the plaintiff to ſhew how he came by them. 278
Where in debt againſt one as executor, defendant pleads a retainer, and plaintiff replies that he is executor *de ſon tort*, and defendant rejoins, that after the laſt continuance he hath taken out adminiſtration; this laſt a good plea, and no waiver of the former. 327
And in the ſame caſe, the plaintiff might have put in iſſue any part of the firſt plea or rejoinder. 332
A matter *in eſſe* at the time of the firſt plea cannot be pleaded *puis darrein continuance*. 332
So if the non-exiſtence thereof was owing to the party. 332
A plea *puis darrein continuance* inconſiſtent with the firſt is a waiver thereof. 332
So if in the laſt plea the words are *relicta verificatione*. 332
Where in debt on bond againſt an adminiſtrator, he pleads the cuſtom of *London*, that if one citizen of *L.* is indebted to another on ſimple-contract, debt lies thereon againſt his adminiſtrator as on a *conceſſit ſolvere*, and he ſhews judgments recovered accordingly; this not ſufficient without pleading that the adminiſtrator is bound to pay the debt as if due on bond. *Page* 340
And in the ſame caſe, it is not ſufficient to aver that the inteſtate was indebted to the parties in *L.* but the contracts muſt be ſhewn to have been made within *L.* 341
Where a declaration in ejectment is delivered before the eſſoin day, *Q.* whether tenant in poſſeſſion can apply for leave to plead to the juriſdiction after four days of the term and two days after appearance. 369
Q. Whether defendant in ejectment is intitled to a plea that the lands lie in a county-palatine, without ſhewthat all the tenants live there. 369

Poor.

See Tit. *Orders.*

Pauper.

Settlement.

An hamlet may provide for its own poor, though it be in a county not mentioned in 12, 13 *Car.* 2. *c.* 12. *Page* 314

An extraparochial place having officers, is obliged to maintain its own poor. 314

Precedents.

The force thereof. 145

Prison.

A perſon in cuſtody for the crown cannot be removed to another priſon at the inſtance of a private creditor. 274

Privilege.

Where defendant pleads his privilege as a ſide-clerk in the Exchequer, a good replication that there is no record. 45

Where defendant pleads that the barons of the Exchequer, and ſitting clerks and other officers attending there, are intitled to privilege ſo long as it is open, and that he is a ſide or ſitting clerk to *J. T.* as remembrancer of the Exchequer in the diviſion of lord *M.* this plea ill, becauſe *non conſtat* that he is one of the officers intitled. *&c.* 45

And alſo becauſe the privilege extends during attendance only. 45

Q. alſo, whether plea be not too general, as extending to all clerks occaſionally attending there. 45

Where privilege is pleaded, and it does not appear by inrolment, there ought to be a *profert* of the writ of privilege. 46

A clerk of a prothonotary intitled to no privilege as a defendant, but only to an attachment. 46

A party attending the trial of his cauſe ought not to be ſerved with proceſs. 275

But *Q.* whether ſuch ſervice is void. 276

A clergyman intitled to a writ of privilege from ſerving as collector and expenditor under

under the ſtatute of ſewers. *Page* 353

Prohibition.

Where it appears either on the proceedings below or affidavit that the ſuit is for words ſpoken, and actionable in *London*, prohibition lies after ſentence. 7

Otherwiſe if this appears only on a ſuggeſtion not verified by affidavit. 7

Where a rule to ſhew cauſe for a prohibition is not ſerved till after ſentence, all one as a motion after ſentence. 7

℣. Whether a cuſtom and denial of the plea below may be ſuggeſted together, theſe being different matters. 7

Where a prohibition is prayed to a ſuit in court-chriſtian for words ſpoken in *London*, on a ſuggeſtion of the cuſtom, ſufficient, if it appears on the libel (though not in the ſuggeſtion) that the words were ſpoken in *L.* 7

In the ſame caſe the ſuggeſtion being, that the words were ſpoken "in *St. Bride*'s in "*London*, or the parts near "adjacent," this not good. 7

Prohibition lies after ſentence, to a ſuit in the ſpiritual court by former churchwardens againſt their ſucceſſors, wherein an account is decreed, and a rate made for reimburſing, &c. that court having power only to order an account. *Page* 11

And in this caſe no affidavit is neceſſary. 11

Prohibition lies not to an appeal in the court of arches from a petition to the ordinary for a licence for ſetting up a monument. 69, 70

Where an appeal is made to the archbiſhop of *C.* as viſitor of a college by a fellow thereof, and the appellant prays a prohibition, ſuggeſting another to be viſitor, the prohibition denied; the archbiſhop having acted as viſitor for 400 years, and no other now claiming the power. 258

Prohibition lies at the inſtance of the proſecutor below. 258

Prohibition lies not to a ſuit in the ſpiritual court for calling a perſon bawd. 285

Prohibition lies not to a ſuit in court-chriſtian for calling a woman whore, upon

a ſug-

a ſuggeſtion that the woman lived in *B.* and by cuſtom ſuch defamation is puniſhable in the temporal courts there, without an affidavit thereof. *Page* 299

So of words ſpoken in *London.* 304

Quakers.

WHERE an attachment is prayed againſt a quaker for taking an unreaſonable ſum under an attachment for coſts in a civil action, whether the party's affirmation may be read. 200

Quo warranto.

Quo warranto not grantable for holding a court-leet at the inſtance of the lord of the hundred. 15

Where in *quo warranto* ſome iſſues are found for the King, and others for the defendant, but it appears defendant has no title, judgment muſt be againſt him. 391, 392

Raviſhment.

THE taking away a young woman under ſixteen from a guardian appointed by Chancery, and marrying her to her diſparagement, though with her conſent, and without force, is an offence at common law, and puniſhable by information. *Page* 310

Record.

Where a final judgment on a writ of inquiry and taxation of coſts are loſt, it may be ſupplied by a new writ of inquiry of *nunc pro tunc.* 12

Plaintiff not obliged to enter up judgment at the inſtance of a ſtranger, though an informer, in order to be evidence. 22

Remainders.

Where lands are limited to *R. D.* for 99 years, if he ſo long lives, and after his death, or other ſooner determination of his eſtate, to truſtees for his life to ſupport contingent remainders, and after the end or other ſooner determination of the ſaid term, remainder to the firſt ſon of *R. D.* in tail, with remainders over; the limitation to truſtees is a good

good and veſted remainder, and conſequently a fine and recovery by *R. D.* and his firſt ſon are not ſufficient to defeat the remainders over. *Page* 125, 137 (in margin.)

Rent.

See Tit. *Ejectment.*

Settlements.

See Tit. *Orders.*

THE renting a windmill ſufficient to gain a ſettlement, under 9, 10 *W.* 3. *c.* 11. 3

And the giving ſureties for the rent is no impediment to the ſettlement. 3

Where one dies inteſtate, leaving two ſons *A.* and *B.* and *B.* takes his diſtributory ſhare in goods, and *A.* lives in a leaſe-hold cottage, &c. till the end of the term, without taking adminiſtration, this not ſufficient to gain a ſettlement for *A.* 5

Otherwiſe if *A.* had taken out adminiſtration. *Qu.* 5

A ſervice for a year upon two contracts, (though on the laſt day of the firſt contract the pauper was abſent for an hour by the maſter's conſent) gains a ſettlement on 8, 9 *W.* 3. *c.* 30. *Page* 62

So where the ſervice is with two maſters. 63

Where a pauper goes from *Sowton* (leaving his family there) to *Sidbury*, where he has an eſtate in his own right for term of years of 19*l.* 10*s. per ann.* taking it for his home, and cultivates the eſtate, but has no ſtock or goods at *Sidbury*, and lodges at a publick houſe, and continues there for forty days in the whole, but not ſucceſſively, and is as much of the time at *Sowton* and other places as at *Sidbury*, and after ſtaying thus at *Sidbury*, for five months ſells his eſtate; he gains a new ſettlement at *Sidbury*. 345

If children live with their father, without gaining a ſettlement of their own, their ſettlement follows that of their father. 350

Otherwiſe if they leave their father's family, and gain a new ſettlement of their own. 350

The ſame law in the caſe of the mother. 350

An

An apprenticeſhip of a poor boy by one overſeer ſufficient to gain a ſettlement. *Page* 362
And it is not neceſſary to make the apprentice a party to the indenture. 363
Nor is it neceſſary to ſhew in orders for what time he was bound apprentice. 363
And if the indenture be ſtampt with a ſixpenny ſtamp, it is ſufficient. 363
Where a poor perſon is bound apprentice, neceſſary on 43 *El. c.* 2. that one of the juſtices confirming the indentures be of the *quorum*, for gaining a ſettlement. 363, 371

Statutes.

Actions upon general ſtatutes relating to the publick muſt be *qui tam.* 119
Statutes of hue and cry not penal. 119

3 *H.* 7. *c.* 10. *of coſts.*

See Tit. *Coſts.*

21 *H.* 8. *c.* 13. *of non-reſidence.*

Information hereon not to be brought before judges of aſſiſe, the act extending only to the courts of *Weſtminſter-hall.* *Page* 27, 291

4, 5 *P. & M. c.* 8. *of raviſhment.*

The taking away a young woman under ſixteen from a guardian appointed by Chancery, and marrying her to her diſparagement, though with her conſent, and without force, is an offence againſt this act, and puniſhable by information. 310, 312

5 *Eliz. c.* 13. *of additions.*

See Tit. *Excommunicato capiendo.*

43 *Eliz. c.* 2. *poor.*

See Tit. *Orders.*

3 *J.* 1. *c.* 15. *of coſts.*

Where the *damnum* is laid above 40*s.* and leſs recovered, within this act. 377
This act extends to rich as well as poor tradeſmen. 379

21 *J.* 1. *c.* 4. *of informations.*

This act not extends to ſtatute of

of 12 *A.* of uſury, or to any ſubſequent ſtatutes. *Page* 25

12 *Car.* 2. *c.* 12. *poor.*

The twenty-firſt ſection of this ſtatute extends to all counties. 314

12 *Car.* 2. *c.* 25. *of ſelling wine.*

A merchant-importer within this act. 392
Selling wine by one dozen quart bottles within this act. 393

15 *Car.* 2. *c.* 11. *of exciſe.*

See Tit. *By-law.*

16, 17 *Car.* 2. *ſeſſ.* 2. *c.* 8. *of coſts.*

See Tit. *Coſts.*

30 *Car.* 2. *c.* 7. *of executors.*

This act not includes an executor *de ſon tort* of an executor *de ſon tort.* 252

3 *W. & M. c.* 10. *of coſts.*

See Tit. *Coſts.*

7, 8 *W.* 3. *c.* 34. *of Quakers.*

See Tit. *Quakers.*

8, 9 *W.* 3. *c.* 11. *of coſts and abatement.*

See Tit. *Abatement.*

Coſts.

A ſuggeſtion muſt be made on the roll of the death of one of the parties to have advantage of this act. *Page* 58

9, 10 *W.* 3. *c.* 15. *of awards.*

See Tit. *Awards.*

1 *A. ſeſſ.* 1. *c.* 18. *of highways.*

Neceſſary to be preſented that a bridge is out of repair, but not by whom to be repaired. 285
Where it is doubtful who ought to repair, proper to be found by inqueſt. 285

2 *A. c.* 6. } *Iriſh acts of papiſts.*
8 *A. c.* 3. }

See Tit. *Evidence.*

4, 5 *A. c.* 16. *of trials.*

See Tit. *Stat.* 3 G. 2. *c.* 25.

5 *A. c.* 14. *of game.*

See Tit. *Convictions.*

Acon-

A conviction "for unlawfully keeping a gun, being "an engine, for deſtroying game, contrary to "the ſtatute," &c. without ſaying that it was uſed for that purpoſe, ill. *Page* 255

So where one is ſued for keeping any of the things mentioned in the act, it muſt be averred to be for deſtroying game. 256

And the bare having theſe is not puniſhable unleſs uſed for killing game; but the party ſued muſt prove he uſed them for other purpoſes. 256, 257

8 *A. c.* 14. *of rent.*

Where land is let for a year, and afterwards at will for a leſs rent than before, and both rents are payable half-yearly, and at the end of the firſt half year under the laſt demiſe an execution comes, the landlord is intitled only to the two laſt half years rent. 217

Where land is let for a year, and then part thereof at will, and an execution comes, the landlord is not intitled to any part of the firſt year's rent. 217

If landlord does not ſhew a full caſe intitling himſelf to rent, he is not relievable by motion, but by action only. 217

9 *A. c.* 14. *of gaming.*

Where money is loſt by gaming, and no ſecurity given, an action lies for the money loſt, and the ſame cannot be recovered back. 70, 71

9 *A. c.* 23. *of hackney coaches.*

See Tit. *Stat.* 1 *G.* 1. *c.* 57.

A coach let for hire for a day, though not uſed to ply in the ſtreets, within this act. 80

1 *G.* 1 *c.* 57. *of hackney coaches.*

See Tit. *Stat.* 1 *G.* 1. *c.* 57.

This act extends to funeral coaches only. 80

5 *G.* 1. *c.* 12. *of waggons.*

A conviction on the evidence only of the perſon ſeizing, is inſufficient. 18

5 G. 1. c. 13. *of jeofails.*

Where an original is returnable the ſame term of which the *placita* are entred, this (if erroneous) cured by this act. *Page* 248

7 G. 1. c. 28. *of ſouth-ſea.*

Where a director is a leſſee, his covenant for payment of rent not diſcharged hereby. 40

11 G. 1. c. 4. *of corporations.*

See Tit. *Mandamus.*

2 G. 2. c. 23. *of attornies.*

Where a *latitat* goes to the biſhop of *Durham* for a mandate, and the *latitat* is ſubſcribed by an attorney of the *K. B.* ſufficient within this act. 196

This act not extends to mandates. 196

In the caſe of an executor of an attorney, the attorney's bills are not within this act. 276

This act extends not to mandates. 196

In the caſe of an executor of an attorney, the attorney's bills are not within this act. 276

2 G. 2. c. 24. *of elections.*

This act extends not only to candidates, and perſons employed by them, but to all others. *Page* 248

2 G. 2. c. 28. *of alehouſes.*

A general licence ſufficient. 81

Q. Whether a perſon acting under a licence not duly granted incurs the penalty of the act. 81

3 G. 2. c. 25. *of juries.*

See Tit. *Coſts.*

By requiring the ſheriff to return the jury out of the county, it repeals the 4, 5 *A. c.* 16. for a trial by the neighbourhood in penal actions, and in this caſe the *venire* muſt be *de comitatu.* 99

3 G. 2. c. 26. *of coals.*

Where *A.* a lighterman gives a note to *B.* a maſter of a ſhip employed in bringing coals to *London*, and *B.* indorſes it to *C.* towards payment of goods bought of him

him, and afterwards (*A.* proving insolvent without payment of the note) *C.* brings an action against *B.* for the goods; this a case not within the act, which extends only to contractors for coals, and to actions brought on notes. *Page* 187

9 *G.* 2. *c.* 23. *Gin-act.*

A justice of peace may convict a person for selling gin without entry in a warehouse, and without licence. 289

And it is not necessary to shew in the conviction that defendant is not exempted. 289

9 *G.* 2 *c.* 35. *of pardon.*

This act must be taken advantage of, not by motion, but by pleading or suggestion on the record. 274

Suggestion.

Where in an action between citizens of *London* the *damnum* is laid above 40*s.* and less recovered, a suggestion may be entred on the roll to entitle the party to costs, upon 3 *J.* 1. *c.* 15. 377

Trespass.

IN trespass for a forcible entry, *liberum tenementum* a good plea. *Page* 109

And upon not guilty pleaded, a freehold may be given in evidence. 109

Trial.

Whether defendant be a side or sitting clerk in the Exchequer, triable by record. 45

Where in *quo warranto* for usurping an office there are several issues, some of which are immaterial, and these are found against evidence, and there is a general verdict against defendant a new trial grantable, though the material issues (upon which alone there must be judgment against the defendant) are well found. 260

A trial at bar not grantable, unless it be a case both of difficulty and value. 271.

A trial at bar not to be granted of a country-cause, if many of the witnesses are old or infirm. 273

After a special verdict in ejectment upon a trial at bar, a new trial denied where the evidence

evidence was doubtful only. *Page* 315
Of the antiquity and reaſon of granting new trials. 322
A new trial grantable after a trial at bar, where the verdict is againſt evidence. 323
Q. Whether a new trial is grantable after a ſpecial verdict. 323
A new trial grantable in ejectment after a trial at *niſi prius*, whether the verdict be for plaintiff or defendant. 324
But Q. whether grantable in ejectment after a trial at bar. 324

Trover.

By judgment in trover againſt defendant, the goods become his property. 19

Variance.

See Tit. *Demurrer.*

WHERE defendant is named [*Joſeph*] in the writ, and [*Joſoph*] in the count, an immaterial variance, though aſſigned for cauſe of demurrer. 75
Variance between the writ and count proper to be pleaded in abatement, and not good cauſe of demurrer. *Page* 75

Venire facias.

A general award of it, without ſaying to the ſheriff of what county, is good. 23
In debt on the ſtatute againſt gaming, the *venire* tho' awarded *de corpore comitatus*, held ſufficient. 99
Where in *indebitatus aſſumpſit* brought in an inferior court for work and labour done, the iſſue is, whether the cauſe of action accrued within the juriſdiction, and the *venire* is, whether defendant did promiſe *modo & forma prædict'*; and the verdict is accordingly, not good, becauſe [*modo & forma*] do not relate to the place of the work and labour. 160

Venue.

The *venue* may be changed in actions on notes in *K. B.* otherwiſe in *C. B.* 65
Venue never to be changed in caſe of ſpecialties. 66
In tranſitory actions, if an attorney be defendant, he may change the *venue* to *Middleſex.* 381

So of a counſel. *Page* 381
And if an attorney be plaintiff, he may lay the *venue* where he pleaſes. 381

Verdict.

See Tit. *Expoſition.*

Where in *quo warranto* for acting as a burgeſs, the jury find a nomination only, and not a ſwearing and election, defendant cannot have judgment. 173, 174
So where an election is found, and not a good ſwearing. 119
Where in *quo warranto* for acting as burgeſs, the iſſue is, whether the perſon who held the aſſembly when defendant was elected was mayor, and it appears by ſpecial verdict that he was not lawful mayor, the iſſue is found againſt defendant. 172, 173
Where in *quo warranto* for acting as mayor, it is found that he was elected by *A. B.* acting as mayor, *&c.* it is to be intended that *A. B.* was lawful mayor, eſpecially as his right was not controverted. 119
Where in *quo warranto* it appears that *John P.* was mayor, and afterwards it is ſtated that defendant was ſworn before "the ſaid "*James P.*" this well enough. *Page* 123
Where in debt on a covenant for paying 52*l.* 10*s.* *per* month as long as a ſhip ſhall be out; the ſum demanded is 500*l.* and iſſue is joined on the payment of ſaid monthly ſum, and it is found that as to 357*l.* 11*s.* defendant did not pay, and nothing is ſaid as to reſidue of the 500*l.* the verdict is ill. 156
Where it is alledged that the jurors aforeſaid to the truth of the premiſſes [without adding "to ſpeak"] being elected, *&c.* this is erroneous. 160
Where in *indebitatus aſſumpſit* brought in an inferior court for work and labour done, the iſſue is, whether the cauſe of action accrued within the juriſdiction, and the *venire* is, whether defendant did promiſe *modo & forma prædict'*; and the verdict is accordingly, this not good. 160
Where in treſpaſs plaintiff declares that defendant beat and impriſoned him for a long time, *ſcil.* for 25 weeks then next, [which extends

extends beyond the bringing the action] and he gets a verdict in which intire damages are given; this well enough, what comes under the *ſcilicet* being to be rejected. *Page* 250

Otherwiſe if it had not been under a *ſcilicet*. 250

Where in *quo warranto* for uſurping an office, there are ſeveral iſſues, ſome of which are found for the defendant, yet if it appears on the whole he has no title, judgment muſt be againſt him. 262

Where there are ſeveral iſſues, a general verdict ought not to be found, but a ſeparate verdict upon each iſſue. 262

So if ſome of the iſſues are immaterial. 262

A verdict refuſed to be ſet aſide on affidavit by two of the jurors, that it was contrary to their intention, eſpecially as it was not againſt evidence. 382

Words.

See Tit. *Information.*

"YOU do not do right," ſpoken to a juſtice of peace by one brought before him for non-payment of ſervant's wages, not indictable, eſpecially if not ſpoken to him in the execution of his office. *Page* 226

"You are a common ſtreet "walking bitch, and ſtand "every night in the ſtreet "to be picked up by fel-"lows," not actionable. 375

Writs.

See Tit. *Expoſition.*

Stat. 3 *G.* 2. *c.* 23.

Officers.

A writ of inquiry with a wrong teſte not void, but irregular only. 74

A writ cannot be ſuperſeded after it is returnable. 195

Where the original is returnable the ſame term of which the *placita* are entered, good in *C. B.* 248

But in *K. B.* if the action is brought the ſame term the debt accrues, there muſt be a ſpecial memorandum. 248

No need of any return of ſummons or attachment by pledges to a *venire facias*, or *habeas corpora juratorum*, ſince 5 *G.*2.*c.*25. *Page* 248

The want of a return to a *venire facias* and *habeas corpora juratorum*, cured by appearance of the jury. *Page* 248

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